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1930.

THE

LAW REPORTS

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HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1930.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON,
W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

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JUDGES, LAW OFFICERS, ETC.

MEMORANDA.

1929.

Dec. 5. *His Royal Highness the Prince of Wales, K.G., K.T., K.P., acting on behalf of His Majesty, conferred the honour of Knighthood upon* MR. JUSTICE (CHARLES ALAN) BENNETT, *at York House, St. James's Palace, on Wednesday the 4th instant.*

Dec. 17. *This day* SIR MARK LEMON ROMER, *a Lord Justice of Appeal, and* SIR JOHN MEIR ASTBURY, *lately a Justice of His Majesty's High Court of Justice, Chancery Division, were, by His Majesty's Command, sworn of His Majesty's Most Honourable Privy Council, and took their places at the Board accordingly.*

Dec. 17. *This day* SIR MONTAGUE SHEARMAN, *lately a Justice of His Majesty's High Court of Justice, King's Bench Division, was, by His Majesty's command, appointed a Member of His Majesty's Most Honourable Privy Council.*

1930.

Jan. 6. THE HON. SIR MONTAGUE SHEARMAN, *lately a Justice of His Majesty's High Court of Justice, King's Bench Division, died this day at Leigh House, Eaton Gate, S.W., aged* 72.

Feb. 3. THE RIGHT HON. HUGH PATTISON MACMILLAN, *formerly Lord Advocate for Scotland, was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act,* 1876, *in the place of the Right Hon. Viscount Sumner, G.C.B., resigned. Mr. Macmillan was granted the dignity of a Baron for life by the style and title of Baron Macmillan of Aberfeldy, in the county of Perth.*

Feb. 15. SIR WILLIAM FRANCIS KYFFIN TAYLOR, G.B.E., K.C., *was appointed to be a Commissioner under the Railway and Canal Traffic Act,* 1888, *to fill the vacancy caused by the resignation of Sir Edward Tindal Atkinson, K.C.*

Mar. 10. THE RIGHT HON. SIR MATTHEW INGLE JOYCE, *sometime a Justice of His Majesty's High Court of Justice, Chancery Division, died this day at Park Avenue, Mossley Hill, Liverpool, in his* 91*st year.*

Apr. 28. SIR ROBERT FRANCIS DUNNELL, BART., K.C.B., *was appointed to be a Commissioner under the Railway and Canal Traffic Act,* 1888, *to fill the vacancy caused by the death of Sir John Charles Lewis Coward, K.C.*

June 3. THE RIGHT HON. SIR JOHN SIMON, K.C.V.O., O.B.E., K.C., M.P., *sometime Attorney-General, was appointed a G.C.S.I.*

THE RIGHT HON. STANLEY OWEN, BARON BUCKMASTER, *sometime Lord High Chancellor of Great Britain, was appointed a G.C.V.O.*

June 13. THE RIGHT HON. SIR WILLIAM SOLOMON, K.C.M.G., K.C.S.I., *a Member of the Judicial Committee of the Privy Council and sometime Chief Justice of the Union of South Africa, died this day at Ruthin, North Wales, aged* 77.

July 20. THE RIGHT HON. SIR ROBERT STOUT, K.C.M.G., *a member of the Judicial Committee of the Privy Council and formerly Chief Justice of New Zealand, died this day in New Zealand, aged* 86.

July 20. THE RIGHT HON. SIR BINOD CHUNDER MITTER, *a Member of the Judicial Committee of the Privy Council, died this day at* 73, *Ashley Gardens, Westminster, S.W., aged* 58.

Aug. 1. EDWARD ALFRED MITCHELL-INNES, ESQ., C.B.E., K.C., *was appointed to be His Majesty's Solicitor-General of the County Palatine of Durham.*

Sept. 30. THE RIGHT HON. THE EARL OF BIRKENHEAD, G.C.S.I., *sometime Lord High Chancellor of Great Britain, died this day at his residence,* 32, *Grosvenor Gardens, S.W.* 1, *aged* 58.

Oct. 27. GEORGE PHILIP LANGTON, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in the place of the Hon. Mr. Justice Hill, resigned, and was afterwards knighted.*

THE HON. RICHARD STAFFORD CRIPPS, K.C., *was appointed to be His Majesty's Solicitor-General in succession to Sir James Benjamin Melville, K.C., M.P., resigned, and was afterwards knighted.*

Oct. 31. *His Majesty was pleased to direct that* SIR DINSHAH FARDUNJI MULLA, C.I.E., *be sworn of His Majesty's Most Honourable Privy Council and that he be appointed a Member of the Judicial Committee of the Privy Council under the provisions of the Appellate Jurisdiction Act,* 1929.

ERRATA.

Page.	*Line*	*For*	*Read*
33	12 and 13	should read W. A. Greene K.C. and C. B. Marriott K.C. (both of the English Bar)	
126	8	Lyndburn	Lymburn
128	11	Aspernantura ut	aspernantur aut
148	11	" Condition 8 of the indorsement of the bond states that :—"	" The method of transfer is described in the special case submitted to the Supreme Court as follows :—"
152	8	The words " The appellants must pay the costs " should be omitted.	
359	Footnote (11)	[1926] A. C.	[1896] A. C.
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583	13	protection	production

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

ROSS . . . . APPELLANT; H. L. (Sc.)*

AND 1929

ELLISON OR ROSS . . . . RESPONDENT. *July* 24.

International Law—Domicil—Jurisdiction—Husband and Wife—Divorce—Husband's Domicil of origin Scottish—Residence in New York—Domicil of Origin whether abandoned.

Per Lord Buckmaster: Declarations of intention are rightly regarded in determining the question of a change of domicil, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression.

In an action of divorce for adultery brought in December, 1923, by the respondent against her husband the appellant, the appellant disputed the jurisdiction of the Court to entertain the action, on the ground that he had acquired a domicil in the United States, and denied the charge of adultery. The appellant's domicil of origin was Scottish, and he succeeded to an ancient family estate in Scotland and to a title. Having left Scotland in 1895 to make his fortune, the appellant went to Quebec in 1902, where he carried on an extensive business of manufacturing arms until he sold it in 1917. After visiting England and taking a house for his wife in London he took a flat in New York for the purpose of superintending there the investment of his money, and from 1919 until the institution of the divorce proceedings in 1923 he resided

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and LORD THANKERTON.

H. L. (Sc.)
1929
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Ross.

for a part of each year in that city. In 1920 he gave instructions as to taking out letters of naturalization in America. This proposal was subsequently dropped, but he obtained a ruling from the New York revenue authorities that for income tax purposes he was a resident alien in the United States. Throughout this period he expressed to business associates his intention of living permanently in New York, but in correspondence with his wife he referred to the family residence in Scotland as "home." In December, 1920, he stated in an affidavit that he was a domiciled Scotsman:—

Held, that the appellant had failed to prove that he had abandoned his domicil of origin and acquired a domicil of choice in the United States.

Decision of the First Division of the Court of Session in Scotland 1926 S. C. 1038 affirmed.

Held, further (by Lord Buckmaster, Lord Warrington of Clyffe, Lord Atkin and Lord Thankerton; Viscount Dunedin dissenting), on the evidence, that the charge of adultery was not established.

Decision of the First Division reversed.

APPEALS from four interlocutors of the First Division of the Court of Session in Scotland dated July 20, 1926 (1), February 15, 1928, March 16, 1928, and December 8, 1928.

On December 11, 1923, the respondent brought an action of divorce against her husband, Sir Charles Ross, the appellant, on the ground that he had committed adultery with an American lady, Mrs. Dalziel (since deceased), who was made a co-defender in the action.

The appellant disputed the jurisdiction of the Scottish Court to entertain the action, and maintained that at the date when the action was brought he had acquired a domicil in the United States, and he denied the charge of adultery.

The appellant was born in Scotland in 1872. In 1883 he succeeded to the estates of Balnagown in Ross-shire and Bonnington in Lanarkshire and also to a Nova Scotia baronetcy, and until 1895 he lived mainly in Scotland. In that year he went abroad to revive the family fortunes. In 1901 he married the respondent, an American, and thereafter he lived for the greater part of his time either in Canada or in the United States.

The facts of the case both as to domicil and as to the charge of adultery are fully stated in the opinion of Lord Buckmaster.

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(1) 1926 S. C. 1038.

H. L. (Sc.)
1929
Ross
v.
Ross.

By the first interlocutor the First Division (the Lord President, Lord Sands, Lord Blackburn, and Lord Ashmore), reversing the decision of the Lord Ordinary, Lord Morison, held that the appellant had failed to establish that he had acquired a domicil in the United States, and they accordingly repelled the plea of no jurisdiction and remitted the case to Lord Morison to be heard on the merits.

On June 4, 1927, Lord Morison held that the charges of adultery were not proved and assoilzied the defender and co-defender from the conclusions of the summons.

When the case came before the First Division on the merits the respondent obtained leave to amend her record and to lead additional proofs, and the second and third interlocutors under appeal relate to these matters.

By the fourth interlocutor the First Division found that the appellant was guilty of adultery and granted a decree of divorce.

The arguments are reported on the question of domicil only.

1929. May 7, 9, 13. *Stuart Bevan K.C.* and *Hon. Geoffrey Lawrence K.C.* (both of the English Bar) (with *Ralph Bury* (of the English Bar) and *R. P. Morison* (of the Scottish Bar)) for the appellant. Since 1919 the appellant had made New York his principal place of residence and had shown a fixed intention of making that city his permanent home. The determination of the appellant to live in the United States is proved (inter alia) by a letter which he wrote in December, 1920, to a Mr. Nicholson, an American solicitor, to take the necessary steps to enable him to become a citizen of the United States. These instructions were not carried out at the time owing to some technical difficulty, but the appellant obtained a declaration from the local revenue authorities that, for income tax purposes, he was a resident alien in the United States. The motive which induced the appellant to live in New York—namely, his wish to avoid double taxation—is irrelevant to the question whether he has acquired a new domicil, which depends solely upon intention. No great reliance can be placed upon the fact that he occasionally visited Balnagown for purposes connected with the estate or that in certain correspondence with his wife he used the word "home" in referring to Balnagown, since that is a natural way for a person living abroad to describe the place where he was born and brought up. There is no evidence that he ever made his home at Balnagown. The sound conclusion from all the facts is that at the date when the divorce proceedings were instituted the appellant had abandoned his domicil of origin in Scotland and had acquired a domicil of choice in the United States.

[They referred to *Bell* v. *Kennedy* (1); *Main* v. *Main* (2); *Fairbairn* v. *Neville* (3); *Tasker* v. *Grieve* (4); *Doucet* v. *Geoghegan* (5); *Marchioness of Huntly* v. *Gaskell* (6); *Corbidge* v. *Somerville.* (7)]

[Lord Buckmaster referred to *Winans* v. *Attorney-General.* (8)]

Condie Sandeman D.F. and *Robert H. Maconochie* (of the Scottish Bar) (with them *W. S. Morrison* (of the English Bar)) for the respondent were called on upon the question of adultery only.

Stuart Bevan K.C. replied.

The House took time for consideration.

1929. July 24. Lord Buckmaster. My Lords, the appellant in this case is Sir Charles Ross and the respondent is his wife.

The appeal is brought against four interlocutors of the First Division of the Court of Session, but two of these relate only to procedure. The two that form the substance of the appeal are: (1.) One dated July 20, 1926, declaring that on December 11, 1923, when the summons was issued the appellant was a domiciled Scotsman; and (2.) another dated December 8, 1928, declaring that the appellant had committed adultery with a Mrs. Dalziel. Mrs. Dalziel was originally a party to the proceedings, but has died since they were instituted.

(1) (1868) L. R. 1 H. L. (Sc.) 307, 310.
(2) 1912 1 S. L. T. 493, 494.
(3) (1897) 25 R. 192, 203.
(4) (1905) 8 F. 45.
(5) (1878) 9 Ch. D. 441, 455.
(6) [1906] A. C. 56.
(7) (1914) 51 S. L. R. 406.
(8) [1904] A. C. 287.

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Lord Buckmaster.

Each of the judgments the subject of appeal overruled a judgment of the Lord Ordinary. It is obvious that the two questions raised are distinct, and that of domicil, which lies at the threshold of the dispute, should be considered first. Upon this point I have no hesitation in reaching the conclusion that the interlocutor of the Court of Session should stand. I see no flaw in the reasoning of the learned judges and I should be content to accept their judgments, but as the matter is one of great importance it may be desirable to state shortly the reasons for the opinion that I hold. Sir Charles Ross is the heritable proprietor of an ancient Scottish estate of Balnagown, owning but little other property in Great Britain. Finding the estate but a poor source of income, he left Scotland in 1895 to make his fortune, first in America and then in Canada. He married the pursuer in November, 1901, in America, she being an American by birth. He moved to Canada in 1902, and there in Quebec established and brought to a high pitch of success a business of manufacturing arms. The pursuer and the appellant lived together in Quebec with occasional visits to England and America until 1917. During the whole of this time he was busily engaged in the development of his factory. His business was ultimately sold in 1917 to the Canadian Government. In that year he went to Washington as an expert adviser on munitions, and stayed there till September, 1918. After this he stayed a certain time in Great Britain, and in 1918 purchased the lease of a house No. 33 Warwick Square, London. In 1919 he took a flat in New York to superintend over there the investment of his money, which, for social and political reasons, he decided to invest in the United States, and in 1922 took a lease of a flat in 25 East 48th Street, New York, of which he remained tenant when these proceedings were begun. Up to 1920 there is no statement whatever of his intention to abandon his Scottish domicil. In letters to his wife he refers to Balnagown, but never in terms suggesting that he did not still regard it as his real home. Further, on three separate occasions between December, 1919, and December, 1920, it became necessary for him to state his residence, once in a statement of claim against the Canadian Government, once in a statement of defence in an action against him by a man called Guthrie—in each of these legal documents he was described as of "Balnagown, Co. of Ross, Scotland"; and, finally, in an affidavit made on December 3, 1920, he states in plain terms: "I am a domiciled Scotchman." It is impossible to escape from the conclusion that that statement was deliberately made and it is in accordance with the proper inference to be drawn from the antecedent facts. In December, 1920, therefore his domicil remained unchanged. Between that date and the institution of these proceedings he was engaged in trying to get the benefit for purposes of taxation of being a resident alien in the United States. He had been advised that his position in relation to taxation both here and there would be made easier if he became a domiciled citizen of that country. He succeeded in April, 1923, in establishing his position for income tax purposes as a resident alien in the United States, but it was not until January, 1924, after the institution of these proceedings that he sought to be naturalized as an American citizen. He spent increasing periods of time at Balnagown and in a letter to his wife written from Balnagown, November 22, 1922, he complains that during the last six years she had only spent forty days a year "at home here" while in the same letter he says "my home is always ready for you, but I am afraid the truth of the whole matter is that you dislike the country." The home he referred to was the home of Balnagown; his flat in New York was not regarded by him as his home, nor could it have been one suitable for himself and the pursuer to have lived in. It is perfectly true that throughout this period he made statements in documents and verbally to a number of business people as to his intention to live permanently in New York, but such statements were never made to his wife nor, with one exception, to any personal friend.

Declarations as to intention are rightly regarded in determining the question of a change of domicil, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared expression. So regarded the evidence of declared intention fails to satisfy and is not established by the proved facts. I am therefore of opinion that so far as the question of domicil is concerned, the appeal must fail.

The other question gives rise to more difficulty. Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by documents, e.g., letters and diaries, or antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence. The facts of this case must be regarded in the light of that principle. In 1915 Lady Ross had ceased to live with her husband as his wife; in 1917 she found life with her husband in Quebec impossible. It is not suggested that this was in any way due to his conduct. The social environment was uncongenial to her, and on July 8, 1917, she wrote a letter to her husband which contains these statements: "When you took a home for a year without even telling me, I made up my mind you were settling there and I am not going to, in fact I am done with it for all time." Again she says: "I am not going to pine away in Quebec while this goes on, I don't care a single penny of what happens to me, so it's not that kind of dry rot," and at no time after that did she ever live there. She came to England and took a house, first, at 18 Portman Street and, afterwards, at 33 Warwick Square, and she sometimes joined her husband in America and sometimes in London and Scotland. I do not refer to these facts for the purpose of imputing blame to Lady Ross. The relative conduct of this lady and her husband to each other is wholly immaterial in this case except so far as it throws light on the question of misconduct, and these facts to some extent assist her case since in such circumstances other associations may be more readily formed. His letters to her and hers to him continued to be affectionate, and I see no reason whatever to doubt that they were sincere. In one of December 2, 1919, he says he wants to get back to her ever so much and never leave her again for more than a month or two. In 1920 he obtained the last payment for the sale of his factory, the total of which appears to have been 3,000,000 dollars, and in the spring of that year went for a fishing expedition in Newfoundland with a party of whom Mrs. Dalziel was one. Lady Ross had no interest in fishing or sport, to which he was devoted, and apparently had previously declined to join him on similar expeditions. In 1919 Sir Charles Ross had met Mrs. Dalziel in New York, where she was living with her husband and two daughters, one aged thirteen and the other aged seventeen. He had previously met her in 1896 but had never met her in the interval. Mrs. Dalziel appears to have been one of those enthusiastic sportswomen who demonstrate an interest in nature by seeking to destroy the rarest specimens of her handiwork. She was intrepid, a good horsewoman, a good shot, and had been on sporting expeditions in the Rocky Mountains alone with guides. She was then living, and throughout the history of this case continued to live, on good terms with her husband and family. Sir Charles Ross was in 1920 contemplating an expedition to Africa for big game shooting, and the proposal was made that she should join him and pay 2000*l.* of the expenses. Sir Charles Ross, in the autumn of 1920, proceeded to obtain the approval of Lady Ross to this proposition. She at first resented the idea and invested it with the worst possibilities, but ultimately, though against her will, and with much misgiving, she consented.

Sir Charles Ross had already communicated to Mr. Dalziel his wife's disapproval and stated that unless her consent was given he proposed to abandon the expedition. At no time was it suggested that Sir Charles Ross and Mrs. Dalziel should go alone. A Major Dugmore, who was an expert photographer, and his wife had agreed to form part of the party, and a contract had been made between Major Dugmore and Sir Charles Ross with regard to the rights of reproduction of any photographs Major Dugmore might take. The expedition started at the end of December, 1920, and was accidentally joined on board by Mr. and Mrs. Barns. It arrived at Nairobi, where they stayed at an hotel and then proceeded up country for the real purpose of the trip. It is unnecessary to detail all that took place, for ultimately, owing to one cause and another, particularly to ill health of Major Dugmore, Sir Charles Ross and Mrs. Dalziel went, with no one but natives, on three trips, and were away several days and nights together with no one near but the natives and the wild beasts. I am satisfied upon the evidence that Major Dugmore was not deliberately excluded from these expeditions. It is on these trips that the First Division have found that adultery was committed. Of its actual commission there is no evidence at all. It is assumed from the circumstances that it must be held to have resulted from their close association. Incidents on the boat and in the hotel at Nairobi are brought forward for the purpose of establishing a relationship between the parties so intimate that adultery might be assumed, and this renders necessary an investigation of what these charges were. In the first place it must be remembered that, though Lady Ross gives evidence of her husband's alleged attachment to Mrs. Dalziel, there is no evidence whatever, even assuming that this existed, to suggest that it was in the least degree reciprocated by the lady, and adultery is not unilateral. The fact that they called each other by their Christian names is a triviality which calls for no comment, and the foolish nicknames she gave him—said to be taken from a comic song—are evidence of silliness but none of infatuation. Further, at no time, subject to the incidents to which I will refer, throughout the whole trip was there any evidence of acts of undue familiarity. It is the incidents on the boat and in the hotel that are relied on to show the intimacy from which adultery might be presumed. Upon the boat the matters charged resolve themselves under three heads: The one that they sought each other's society to the exclusion of other people and sat side by side sometimes with one rug to cover them; the second that when passengers were permitted to sleep on deck—the women on one side of the vessel and the men on the other—the two air beds of Sir Charles Ross and Mrs. Dalziel were found side by side in the morning; and the third that a steward called Edwardes found the lady in Sir Charles Ross's cabin one morning at about 7 o'clock in what he described as "déshabille." These incidents were originally relied upon to prove adultery committed on the boat, but they have rightly been regarded by all the judges as insufficient for such a purpose. In my opinion they ought also to be rejected as furnishing any sound foundation for the inference of subsequent adultery. That these two people preferred each other's society to that of the other passengers is probable; they had a common interest in what they were about to do. It is not proved, and I do not think it a fair inference, that they placed the two beds side by side themselves. There is no evidence whatever to show that they did so, and it could hardly have escaped the notice of those on board had these two people dragged their beds across the deck. The beds were the only two air beds, and are said to have been found together when the decks were being cleared in the morning, and it is possible that they were so placed in the course of the decks being cleared. The evidence of the steward must, I think, be accepted with caution. It is coupled with his statement as to Sir John Ross demanding a key of his cabin, the obvious meaning being that he desired in future to be secure; but there was no need of a key for that purpose, since I imagine that this cabin, like any other, is fastened on the inside and the key is only wanted when the cabin is empty; but that his suggestion was that the key was wanted for secrecy is shown by his statement, "After the key was procured Sir Charles kept his cabin locked, and when I went there in the morning he had to get up and open the door to let me in." Finally, the whole of this evidence on the boat is subject to this comment; it is entirely unsupported by any passenger or member of the staff and contradicted by Mr. Barns.

In 1922 Major Dugmore took proceedings against Sir Charles Ross for breach of contract, and in those proceedings Mrs. Dalziel was examined on behalf of Sir Charles Ross and cross-examined on behalf of Major Dugmore. The cross-examination was in part directed to suggested immoral relations with Sir Charles Ross. I do not regard with approval the cross-examination of a woman as to some alleged act of immorality in an action where her moral character is not the issue; but it may be justified in the present case by the suggestion that her affection for Sir Charles Ross would colour her evidence. Whatever may be its justification the cross-examination broke down, and the remarkable fact is that no reference is made to any noticeable conduct on the boat going out, but on the boat going home. Finally, Major Dugmore, whose evidence lies at the root of these proceedings, kept a diary while on board, and it contains no reference whatever to any suspicious behaviour on the part of either Sir Charles Ross or Mrs. Dalziel. The Nairobi incident can be dismissed, as the judges have dismissed it. There is no evidence in its support, and suggestions based on people walking about in their pyjamas in a hot country derives most of its force rather from the name of the garment than from any evil associated with its use. There remain the trips they took together. And the difficulty with regard to these has been rendered more acute by the evidence of Sir Charles Ross himself as to the tents. By common consent a double tent was taken on these expeditions, one that could be erected as two separate tents or as one smaller tent inside another. The latter was the method adopted on a trip when they were accompanied by Macmillan (Sir Charles Ross's servant). On these other expeditions it was said that these tents were set up apart and that the native bearers slept inside Mrs. Dalziel's tent. This latter statement I cannot believe, but, disbelieving this, there still remains the question whether these trips with their hazards and excitements were used as a means of committing adultery in a spot surrounded by natives and wild beasts and where, according to Sir Charles Ross's evidence, every night might be spent in uncertainty and suspense. There is not before me the material that enables me to infer that adultery then took place, and the learned judges who take a different view rest their conclusion on the effect in their eyes of the antecedent matters, which do not make the same impression upon me.

This conclusion is not in my opinion disturbed by subsequent evidence. The proceedings were amended for the purpose of showing that conduct which occurred in New York on February 7 and in March of 1925 threw light on the previous incidents. The evidence in support of this charge was that of two servants in the house of Mrs. Dalziel. They allege that Sir Charles Ross was there daily and constantly stopped to lunch, and on two occasions they spoke to incidents which, if proved, would be very strong. The witnesses were servants, husband and wife, and one of the occasions spoken to by both of them is that of witnessing Sir Charles Ross in the drawing room embracing and kissing Mrs. Dalziel, and the other that of seeing them together in the bedroom, he with his coat off buttoning up his trousers.

This evidence must, I think, be rejected. As to the first incident it is asserted by the female witness that it was seen owing to the reflection on a glass door of the two people within the room. There was a glass door to the room, but the door opened outwards and the inside was covered with curtains that rendered reflection impossible. In order to establish the case, therefore, it was necessary to assert that the door opened inwards and not outwards—and this she confidently said was the fact. The evidence against this is overwhelming, and shows that the door did, in fact, open outwards, and it follows that the alleged vision is wholly imaginary. The man said on the same occasion he saw the same thing in a looking glass in the hall. This seems to me improbable. The evidence as to the bedroom incident is even less acceptable. It is stated that the door was open from within and disclosed Sir Charles Ross in the condition described. It seems astonishing in a small house with people about that any one should have opened the door when Sir Charles Ross was partially undressed, but in fact the door could only open a little way. The butler says that the distance it was opened "might have been a foot or it might have been more," but so opened the spectacle could only have been witnessed had Sir Charles Ross stood in full view of the opening buttoning his clothes while the door was opened—a situation that is highly improbable. That Sir Charles Ross may have visited the house on a few occasions is possible, but that adultery was committed is incredible. Mrs. Dalziel in 1922 had had an operation for cancer of the breast, and in February and March, 1925, she was, according to her husband's evidence, "a very ill woman," and suffering from an infection from which she died in 1927. Sir Charles Ross had just undergone a severe operation for gallstones, with the result that the wound was not wholly healed, that his intestines frequently protruded from the gash and hernia was feared. Adultery under these circumstances seems to me incredible, but it would still have been possible that some act of gross indecency might have been committed which, if proved, would, I think, have cast a different light upon the previous episodes. But the evidence of the servants as to Sir Charles Ross's constant attendance at the house is contradicted by Mr. Dalziel and his daughter, and is proved to be unsound in one material respect, so that reliance cannot be placed upon it. Comment has been made upon the fact that Sir Charles Ross did not give evidence to contradict the allegations as to the events in 1925. The exact reason for his absence is not plain, but Lord Blackburn said the explanation, whatever it was, was plausible, and it is not proved to be untrue. There remains for consideration a further point raised at the last moment, and it is this. There was in Mrs. Dalziel's service a woman named Carroll, who was a fully and properly qualified nurse. She definitely asserts that the result of the operation which took place in 1920 was to produce a condition of contraction in the vagina of Mrs. Dalziel which rendered it impossible effectively even to introduce a douche. I cannot believe that this evidence is wholly fabricated; it is most detailed and circumstantial, and it is confirmed by Mr. Dalziel, who says that from 1920 to 1925, in spite of repeated efforts, connection between himself and his wife was a physical impossibility. It is a matter greatly to be regretted that this evidence was kept back until the last moment. Mr. Dalziel's first statement that he was unwilling to speak of such things can easily be understood, but it is most unfortunate that he should have added to that reason the statement that he desired to keep the fact up his sleeve until the last. Cunning of this description throws grave doubt upon the credibility of any witness, and, but for the strong and striking corroboration on the part of Nurse Carroll, would have made me hestitate before accepting it; but, taken together, this evidence appears very strong, and I cannot think that it should be disregarded. Lord Sands, before whom Nurse Carroll's evidence was taken, says that he had difficulty in relying upon her evidence, and that is all that is said about it. There is no suggestion that he was unfavourably impressed by her demeanour or that he thought that she was lying. Her evidence is extremely detailed, and speaks to a condition which, if it existed and continued, would have rendered adultery incapable of accomplishment. To some extent it is sought to discredit it by the suggestion that such a state could only arise after an operation so extensive as to have rendered recovery as speedy as it seems to have been improbable. None the less the operation might have been of such a nature as to produce this result, and there is no definite evidence as to its extent, as the doctor who performed it was incapable of giving evidence, and further the condition referred to might also have been referable, not to physical injury to the organs caused by the operation, but to nervous condition consequent on its having taken place. Further evidence as to the exact nature of the operation was not forthcoming, and in these circumstances I find it impossible to disregard the uncontradicted evidence of the nurse. The Lord President dismisses it in the following words: "In the supplementary proof an attempt was made to support this defence (i.e., the husband's statement as to incapacity) by means of the evidence of the witness Carroll. I do not think the attempt was successful and the judge who heard the evidence was not favourably impressed by it."

Lord Blackburn also does not think that her evidence is sufficient corroboration of Mrs. Dalziel's condition and fortifies this conclusion by the comment that if such a condition had existed and had been disclosed, it would have afforded a ready answer to Lady Ross's objections to the expedition. With this I cannot agree. It is to my mind quite incredible that Mrs. Dalziel would have proclaimed her infirmity, first to Lady Ross and then to the lawyer. Such a statement, apart from its obvious indelicacy, could only be relevant upon the hypothesis that she was suspected of an intention to commit adultery, a suspicion which she would probably have rejected with scorn, but which, whether rejected or not, would surely never have led to such a revelation as that contemplated by the learned judge.

There is one matter which materially influenced the learned judges upon which I take a view different from theirs which it is desirable to express; it is with regard to the evidence of Major Dugmore. That he was a neutral impartial witness cannot be believed. According to his own evidence he said in answer to the question whether his relations with Sir Charles Ross had during the trip become considerably strained "That is to put it very mildly" and after May 16, 1921, he said he only spoke to him once. The litigation itself and the cross-examination to which I have referred show these statements to have been true. Now Major Dugmore's evidence is supported by a diary and a memorandum. As far as the diary is concerned, assuming, as I do, that it was regularly kept, Major Dugmore was at liberty, in giving his evidence, to refresh his memory by reference to its entries, but in this diary there is nothing of the least value as showing intimacy between Sir Charles Ross and Mrs. Dalziel, though much to evidence Major Dugmore's sense of grievance; as early as February 2 he enters "Ross completely ignored me," and on March 18 there is the following entry:

"March 18.—In bed all day. Ross and Mrs. D. and Alec. went off for day. No one even came near me before starting and when they returned made no effort to see how I was till after they had fed. Hogs! Temperature 103°. 1 porter died." Whether his feelings were justified is not the question, the fact is he felt himself ill-used, and in this frame of mind he prepared, on March 30, a memorandum which contains his account of antecedent incidents beginning twelve months before, and one to which both the learned Lord President and Lord Blackburn refer. I find it difficult to understand how it was ever admitted as evidence. The reason why entries contemporaneous with or immediately consequent on events may be used is that they record an immediate effort of memory and not of imagination, but as each hour passes memory becomes more dim and imagination more active, and consequently such documents as prepared narratives of events are strictly inadmissible and should be excluded from the witness box.

It is, however, from this and not from the daily record that Major Dugmore's evidence as to the antecedent relationship of Sir Charles Ross and Mrs. Dalziel is reinforced, and its concluding passage as to the moral tone is quoted by and evidently impressed the Lord President and is referred to by Lord Blackburn.

Apart altogether from the fact that the document is filled with complaints against Sir Charles Ross and was probably written in a state of ill-health and certainly with ill-feeling, that it contains references to alleged incidents at Nairobi which find no place in the diary, all of which facts would render it unsafe to place too much reliance on its contents, I do not think it ought to have been admitted for any purpose. It has, however, formed part of the proceedings without apparent objection. I have therefore fully considered it in forming the opinion I have expressed and I regard it as wholly insufficient to support the charge of adultery.

I admit this case has caused me great uneasiness. I have read and re-read all the evidence and documents. The whole question is whether, upon the facts this evidence discloses, adultery must be assumed and for the reasons I have given I cannot think it should. In forming this opinion as I do, contrary to the views of the experienced judges of the Inner House, I am glad to find that Lord Sands thought the case to be attended with much difficulty and that the learned judge who tried the case came to the same conclusion as that which I hold. In my opinion the interlocutor appealed from on the question of domicil should be affirmed and that on the question of adultery reversed. I see no reason to interfere with the judgment of the Inner House as to costs. As the appellant has completely failed on the critical question of domicil, there is, I think, no reason to make any order as to the costs of this appeal.

VISCOUNT DUNEDIN. My Lords, upon the question of domicil, I agree with the opinion of Lord Buckmaster, and have nothing to add.

Upon the question of adultery, I regret I cannot agree. I think the First Division were right and that the circumstances of the case lead to the necessary inference that adultery was proved. As, however, this is a mere question of fact, and as I am aware that my views are not shared by the rest of your Lordships, I think that it is quite unnecessary for me to examine in detail the facts of the case. I am content to say that I completely agree with the opinion of Lord Blackburn delivered in the First Division. I wish, however, to emphasize two points. That the two parties concerned had contracted very intimate relations is not questioned. Familiarity, if indeed not indecent familiarity, was amply proved, and beside the question of the ship there was obvious opportunity on the hunting expedition. First I will deal with the allegation that the lady's physical condition was not such as to allow of intercourse. This defence in my view completely broke down. It is supported by the evidence of the husband and the nurse. So far as the husband is concerned, the tricky way in which he said he had "kept it up his sleeve," together with the fact that he was trying to save the character of his dead wife, deprives his testimony to my mind of all weight. So far as the nurse is concerned, I think the evidence entirely breaks down and is insufficient when read in the light of what the three Scotch doctors said. They were men of the highest reputation in the specialized branch of the profession which deals with obstetrical questions. Had the operation included the removal of the vagina, such recovery as would have enabled the lady to go through all the fatigues of the hunting tour would have been impossible, and still less could she have borne shortly thereafter, as she did, the strain and exposure of a fishing expedition. The vagina not being interfered with, there is from their long experience no hindrance whatever to cohabitation. All that the nurse says as to the pain in introducing a douche does not relate to the period in question, and is in my mind either untrue or exaggerated or was due to her own clumsy manipulation.

The other point is as to what the two parties swore to as regards the time which they were away alone with one tent and native beaters, and no other white person. Sir Charles' account of the hourly terrors of the camp is mere bluff. Lions do not attack a camp. And then the asseveration that the lady slept in the inner tent along with a lot of native beaters —a tent a few feet in diameter—is such an obvious lie that to me it deprives the whole testimony of Sir Charles and the lady of any claim to trustworthiness. I therefore emphatically disagree with the result at which your Lordships have arrived.

LORD BUCKMASTER. My Lord Warrington desires me to say that he has read my opinion which I have just delivered and that he agrees with it.

LORD ATKIN. My Lords, on the question of domicil I agree, as the rest of your Lordships do, with the decision of the Lords of the Inner House of the Court of Session that Sir Charles Ross failed to prove that he had abandoned his Scots domicil of origin. I have nothing to add to what has been said by the Noble Lord on the Woolsack.

On the issue of adultery I am of opinion that there is no sufficient reason for displacing the judgment of the Lord Ordinary ; and, as the majority of your Lordships differ from the learned judges of the Inner House on this issue, I proceed to state shortly the grounds of my conclusion. The alleged adultery is found to have taken place in the course of a hunting trip in East Africa during February to April, 1921. No witness gives direct evidence of adultery having been committed: the inference is to be drawn, as in suitable cases it legitimately may, from the conduct of the parties. In these circumstances it is essential to keep in mind the character and surroundings of the parties immediately concerned. Sir Charles Ross, the defender, was in 1921 a man of forty-nine. He had amassed a considerable fortune; he had for several years ceased to have conjugal relations with his wife. In 1917 he had gone to live for business reasons in the United States and in 1919 he had met for the first time in New York the co-defender Mrs. Dalziel. Mrs. Dalziel at that date was about forty-five. She had been married in 1901 to Mr. Dalziel a gentleman of some position who was engaged in financial business in New York. The marriage was a happy one: there were two children girls aged about seventeen and thirteen. She and her husband continued to live together on the best of terms right up to her death in 1927 about four years after the commencement of this suit. The husband knew of and consented to the wife's friendship with Sir Charles Ross. He gave evidence on her behalf. Mrs. Dalziel had private means of her own: she had a taste for big game hunting, which she had been able to procure in America, and she found in Sir Charles Ross a man who had similar tastes. Early in 1920 Mrs. Dalziel had to undergo a severe operation. The womb was removed: it is possible that the operation extended to removal of the ovaries. The nurse who attended her before and after the operation spoke to the larger operation and there is no evidence to contradict it, though there is an absence of medical evidence as to the exact extent. It is known that the operation took place early in 1920. Sir Charles Ross later in the year took Mrs. Dalziel, her daughter and some married friends on a fishing trip in his yacht to the coast of Labrador. No adverse inference against the parties is drawn from this trip. At some time in 1920 Sir Charles Ross and Mrs. Dalziel arranged a joint big game expedition to East Africa: and Sir Charles proceeded to England where Lady Ross then was to make the necessary arrangements. Mrs. Dalziel was to contribute 2000*l.* to the expenses: a Major Dugmore, a photographic expert, was engaged to accompany the trip with his wife and children: it was thought that the films he would make might contribute towards the expenses. Lady Ross at first objected: it is plain that she was perhaps naturally jealous of Mrs. Dalziel. She wrote to her husband to object and also to Mrs. Dalziel. Sir Charles Ross took a step which the Lord President thought remarkable. He wrote to Mr. Dalziel stating that Lady Ross had shown extreme jealousy, that where there was no fault there would be no real objection: but that by innuendo Mr. Dalziel, his wife, daughter and family would suffer; that such a result would be brought about through the hospitality and friendship he had shown to a stranger whom he was absolutely entitled to consider as a fit and proper recipient of his friendship; that the only point to be determined was the course which Sir Charles was to adopt "in order to discharge my obligations to the code of an English gentleman and in doing so to shield you and yours from the slightest breath of scandal." He then proceeds to say that all the arrangements are made, but that a pending case in Canada gives him an excuse for withdrawing, and ends by saying that he proposes to give up going on the trip to Africa with Emily (Mrs. Dalziel) and the Dugmores: and asks Mr. Dalziel to cable whether he approved. Mr. Dalziel cabled back to Sir Charles to go on with the expedition. Lady Ross withdrew her objection no doubt reluctantly: she received Mrs. Dalziel at her house: and the expedition eventually started on the *Guildford Castle*, Sir Charles, Mrs. Dalziel, Major and Mrs. Dugmore and servants. The Lord President thought that in view of Lady Ross' objection the parties could not have persisted in the expedition unless already blinded by a mutual infatuation. I confess that in view of the circumstances, the arrangements having been completed, Mrs. Dalziel being in England, a contract existing with the Dugmores, Sir Charles' offer to withdraw and Mr. Dalziel's refusal to accept the offer, the decision to proceed appears to me to be at least as consistent with the view of the parties that it was unreasonable to allow a carefully arranged plan for a legitimate expedition to be defeated by the unfounded suspicions of a jealous woman, as with the surmise that they were blinded by a mutual infatuation. Indeed the suggestion that the parties embarked upon the expedition in contemplation of opportunities for guilty intercourse seems to me highly improbable. They had opportunities of meeting in New York and London, and why they should take themselves off to Africa for this purpose, hampering themselves with the presence of strangers, Major Dugmore and his wife and children, it is difficult to divine. To make their prospects still more unfavourable in this respect, having met on the *Guildford Castle* a Mr. Barns and his wife they persuaded them to join the expedition, Mr. Barns being a skilled entomologist.

I do not propose to deal in detail with the various circumstances of the voyage and the land expedition from which a conclusion has been drawn unfavourable to the defenders. The adultery found to have taken place is on the occasion of certain side trips on which one tent was taken and on which Sir Charles Ross and Mrs. Dalziel were the only white people, though accompanied by native bearers. It may be admitted that these trips gave the opportunity for intercourse, if intercourse was intended. But from opportunities alone no inference of misconduct can fairly be drawn unless the conduct of the parties prior, contemporaneous, or subsequent justifies the inference that such feelings existed between the parties that opportunities if given would be used for misconduct. In my opinion none of the circumstances relied on led to the inference that either of the parties, and Mrs. Dalziel in particular, either felt or would have yielded to guilty desires. The conduct of the parties throughout appears to me to be consistent with the conduct of middle aged persons conscious of their own rectitude, prepared to ignore, perhaps to indiscretion, the innuendos of censorious people, persons who were good sporting friends and nothing more. I am in entire accord with the view formed by the Lord Ordinary on this matter, as far as the evidence before him was concerned. When the case came before the First Division a successful application was made on behalf of Lady Ross to call further evidence: and evidence and rebutting evidence was heard, and is dealt with by the learned judges. It consisted of evidence of two servants, a husband and wife who had been in the employ of the Dalziels in the house in New York for 2½ months in the year 1925, and who spoke to frequent visits by Sir Charles Ross to Mrs. Dalziel during this period in the absence of Mr. Dalziel and the daughters and to two specific acts of familiarity. I cannot forbear from expressing my own opinion that this evidence was worthless and not deserving of credence. Mrs. Dalziel by this time had met with still further misfortune: in November, 1922, one breast had been removed for cancer. But Sir Charles was in much worse plight. At the end of 1924 he had been operated on for gall stones: unfortunately, owing to a bad cough, an exceptionally bad hernia of the intestines had followed, his stomach was drastically trussed up, and his own condition was such that the distinguished surgeon who had operated was of opinion that sexual intercourse was practically impossible. A medical attendant had accompanied him to New York in January, 1925, on arrival he was at once placed in the hands of another medical attendant who visited him daily, and he was receiving assistance in his business affairs from another witness who was with him practically continuously. These witnesses' evidence was that it was impossible for Sir Charles to have paid the continuous visits spoken to by the two Kincaids. Moreover, the daughter, Miss Dalziel, contradicted the evidence that she was not in the habit of being in the house for lunch. The odd coincidence that both husband and wife were on the spot at the same time to witness the acts of familiarity deposed to and the difficulty with regard to the nature and position of the mirror in which one of the acts was alleged to have been seen confirm the view that the evidence of the Kincaids should be rejected.

The case then is that a respectable married woman of mature years, living happily with her husband and children and retaining their confidence throughout, is charged with adultery. She was too ill to attend the trial and during the appeal proceedings she died. Such a charge in such circumstances ought to be fully proved. That there were opportunities for committing adultery is nothing; there must be circumstances amounting to proof that the opportunities would be used. The circumstances relied on are consistent with the entirely innocent relations of friends with a common interest in sport. I see no reason for interfering with the decision of the Lord Ordinary and I think that on this point the appeal should be allowed. I agree with the order proposed.

Lord Thankerton. My Lords, in the first place, the appellant disputes the jurisdiction of the Scottish Courts on the ground that when the action was raised on December 11, 1923, he was domiciled in the United States of America.

The appellant's domicil of origin was admittedly Scottish and in the end of 1895, at the age of twenty-three, he went to Canada and was in business there until 1917, when he sold his rifle factory to the Canadian Government and went to Washington and thereafter to New York, where he first leased an apartment in 1919. In 1920 he received the last of the very substantial price of his Canadian interests. The details of the period from 1895 to the end of 1920 are fully dealt with in the opinions of their Lordships of the Inner House, and they need not be recapitulated, but I am clearly of opinion that up to the autumn of 1920 the appellant had not acquired a domicil of choice in Canada or elsewhere and that he still fully retained animo et facto his domicil of origin.

But the ensuing three years form the crucial period in the present issue, and admittedly the appellant undertakes the burden of proving the alleged change of his domicil during that period.

It is clear, on authority, that the appellant must prove, animo et facto, the abandonment of his domicil of origin.

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Where there is a complete severance of ties with the domicil of origin, the acquisition animo et facto of a permanent residence in another country may easily imply abandonment of the domicil of origin. But the present case is very different.

In the autumn of 1920 the appellant still retained his Scottish estates, and he continued to retain them at least until after 1923; during that period he resided on them at least as much as in previous years, not only for the purpose of supervising their management but also for the entertainment of guests and for sport. This tie does not appear to have been slackened, and he still refers to Balnagown in terms of affection and as " home."

In the autumn of 1920 he already had an apartment in New York, primarily, at least, for business purposes and the mitigation of the pressure of taxation, but which could hardly be the type of home which he was still hoping, as his letters show, to establish with the respondent. Further, the letters suggest that the latter was to be in this country. During the three years in question he retained an apartment in New York, but his residences there seem to have been as limited as possible, mainly for reasons of health, and every opportunity was taken to occupy what he himself describes as " homes " in London and at Balnagown, or to engage in a sporting expedition. Having been advised by his doctor in 1920 to discontinue business, he was absent from New York during the next three years for some twenty-eight months, of which twelve were spent at Balnagown. It is true that the prospect of setting up a home with the respondent seems to disappear latterly, but, on the other hand, the delay in proceeding with the application for American naturalization, after he became aware in 1921 that Mr. Nicholson had not carried out his original instructions, is not helpful to the appellant's contention.

Valuable evidence is to be found in the correspondence and such documents as the affidavit of December 3, 1920, and, taking them broadly, they are negative of a severance of the ties with his domicil of origin.

In my opinion, the appellant has failed to establish that by December 11, 1923, he had abandoned animo et facto his domicil of origin.

As regards the issue of adultery, the misconduct is alleged to have taken place during a hunting expedition in East Africa in the spring of 1921, and the construction to be placed on the incidents of that expedition is sought to be coloured by familiarities alleged to have taken place (*a*) on the voyage to Africa, and (*b*) after the action was raised, in the co-defender's house in New York early in 1925, in terms of an amendment allowed after the case had reached the Inner House. The Lord President and Lord Sands also founded on the respondent's evidence as proving that Sir Charles Ross and Mrs. Dalziel were already blinded by a mutual infatuation before the African expedition.

Admittedly the respondent must prove facts which are not reasonably capable of an innocent construction. The existence of jealousy in a wife or of gossip on board ship is not inconsistent with complete innocence; indeed, in some cases, the promoters of gossip would be ready to admit that it was not founded on any real ground for imputing immorality. The respondent stated that in November, 1920, although she had no proof, she was perfectly convinced that Mrs. Dalziel was living with her husband; there is not a trace of evidence to justify that suggestion, and, in my opinion, the respondent's evidence is not satisfactory proof, which we ought to accept, of the existence of a mutual infatuation between the parties at that time.

With regard to the incidents on the voyage to Africa, I agree with the conclusions of the Lord Ordinary, and even as to the incident in Sir Charles Ross's cabin, in regard to which the Lord Ordinary discredits the evidence of the bedroom steward Edwardes, I do not regard it as necessarily inconsistent with innocence, although it may well have been indiscreet.

The only witness adduced by the respondent to prove the incidents alleged to have taken place during the African expedition was Major Dugmore, whose evidence was taken

Lord Thankerton.

on commission and who was not examined before the Lord Ordinary. I agree with the criticisms of the Lord Ordinary, and I cannot accept his evidence as satisfactory, especially in the absence of full confirmation by other facts in the case. The respondent's attack on this branch of the case was mainly in regard to the side-trips, to which Major Dugmore was not a party. These side-trips undoubtedly gave opportunities for misconduct if the parties were so minded, but the evidence as a whole appears to me to lead to the conclusion that the expedition to Africa was undertaken by persons with a genuine keenness for sport for the purpose of sport, and that these side-trips were the natural routine of such an expedition, and do not per se justify the inference of misconduct, and I agree with the Lord Ordinary that no sinister inference need be drawn from the fact that only one tent with "fly" was taken. It requires proof of guilty intention to take advantage of these opportunities before the necessary inference of guilt during the side-trips can be drawn. On this matter it is important to consider the age and circumstances of the parties. Mrs. Dalziel at this time was about forty-five years of age, had been married for about twenty years, and had two girls aged seventeen and thirteen respectively. It is in evidence that the marriage was a happy one right up to her death in 1927—four years after this time. On November 24, 1920, Mrs. Dalziel wrote to the respondent: "My husband and children are my first and only consideration, and my only object on this side is big game shooting in Africa, for which I have had a strong desire for years." In my opinion the correctness of this statement is not displaced by the evidence. At this time Sir Charles Ross was nearly fifty years of age, was financially well off, was keen on sporting expeditions, and had been advised by his doctor to take a prolonged rest from business. Mr. Dalziel knew and approved of his wife's friendship with Sir Charles, and he expressly agreed to the expedition to Africa, as he had also known and approved of the fishing expedition to Labrador in the previous summer. The Dean of Faculty admitted that, if the respondent's allegations were well founded, that would involve at least a callous indifference on the part of Mr. Dalziel to what the learned Dean maintained were the obvious inferences to be drawn from the African expedition; in my opinion the evidence does not justify such a charge against Mr. Dalziel.

In my opinion the evidence does not establish the pre-existence of improper relations or that the expedition was undertaken with guilty intent.

There remains the additional evidence taken before Lord Sands relating to the months of February, March and April, 1925. I agree with the opinion of my noble and learned friend Lord Atkin as to the worthlessness of the evidence of the Kincaids and as to the physical condition of Sir Charles and Mrs. Dalziel at this time; I am also of opinion that sufficient weight was not given to the evidence of Miss Dalziel. In my opinion this branch of the case is not proved.

On the issue of adultery I agree with the conclusion of the Lord Ordinary and I concur in the order proposed.

Interlocutors of the First Division of July 20, 1926, *February* 15, 1928, *and March* 16, 1928, *respectively, affirmed. Interlocutor of December* 8, 1928, *reversed, except as to costs, and interlocutor of the Lord Ordinary of June* 4, 1927, *restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment.*

Lords' Journals, July 24, 1929.

Solicitors for the appellant: *Charles Russell & Co., for P. Morison & Son, W.S., Edinburgh.*

Solicitors for the respondent: *Grahames & Co., for Dundas & Wilson, C.S., Edinburgh.*

[HOUSE OF LORDS.]

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CLARK AND OTHERS v. URQUHART

AND

STRACEY AND OTHERS v. URQUHART

Company—Prospectus—Fraudulent Misrepresentation—Untrue Statements in Prospectus—Conspiracy—Alternative Causes of Action—One Sum of Damages claimed in respect of all Causes of Action—Acceptance of Money paid into Court by one tortfeasor in respect of one Cause of Action—Release of joint tortfeasors — Effect on alternative Causes of Action—Satisfaction—Measure of Damages—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 84—*Costs—R. S. C.* (*Ir.*), 1905, *Order* XXII., *r.* 7 (*a*).

The measure of damages in an action under s. 84 of the Companies (Consolidation) Act, 1908, for untrue statements in a prospectus is the same as in the common law action of deceit.

The plaintiff was the holder of a sum of debenture stock in the W. company for which he subscribed on the faith of statements in a prospectus. The debenture stock was issued in connection with an amalgamation scheme whereby the N. company acquired the whole of the share capital of the W. company, and some of the directors of the N. company joined the board of the W. company, and the old directors of the W. company shortly afterwards resigned. The prospectus purported to be an offer for sale by S. & Co., a firm of merchant bankers, as purchasers, of the whole of the issue of the debenture stock.

In an action against (among others) the old and new directors of the W. company and the members of the firm of S. & Co., the plaintiff claimed (*a*) damages for fraudulent misrepresentations in the prospectus; (*b*) compensation under s. 84 of the Companies (Consolidation) Act, 1908, for untrue statements in the prospectus; (*c*) damages for conspiracy to defraud the plaintiff and other subscribers to the debenture stock. These claims were stated in the alternative and one sum was claimed as damages in respect of all the claims.

At the trial of the action before Brown J. and a special jury, the judge held (1.) as regards claim (*a*), that there was no case to go to the jury as against the old directors; (2.) as regards claim (*b*), that no liability was incurred under s. 84, inasmuch as the prospectus was not issued by or on behalf of the company; and (3.) as regards claim (*c*), that there was no case to go to the jury as against any of the defendants, and he dismissed the action as against the old directors. Thereafter the remaining defendants obtained leave to amend their defence by paying into Court, with a denial of liability, a sum representing the full amount of the loss sustained by the plaintiff under claim (*a*), upon the terms of paying to the plaintiff his costs to date, and this sum was taken out by the plaintiff in satisfaction of his claim. The judge then gave judgment for the remaining defendants on claims (*b*) and (*c*). On appeal, the Court of Appeal in Northern Ireland, being of opinion that there was evidence to go to the jury as against all the defendants on all the claims, set aside the judgments of Brown J., and granted a new trial in respect of claims (*b*) and (*c*):—

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* *Present:* VISCOUNT SUMNER, LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, and LORD TOMLIN.

Held, on the evidence, that the judgments of Brown J. had been rightly set aside, but that the acceptance by the plaintiff of the money paid into Court was a satisfaction of all the claims in the action, and that there was therefore no outstanding right in the plaintiff in respect of which a new trial could be ordered.

Held, further, that the House had jurisdiction to exercise the discretion as to costs which the trial judge would have had when the payment into Court was accepted if all the defendants had been before him.

Decision of the Court of Appeal in Northern Ireland [1928] N. I. 162 varied.

APPEALS from an order of the Court of Appeal in Northern Ireland. (1)

The respondent was the holder of 200*l*. debenture stock in Workman, Clark & Co., Ld., for which he had subscribed on the faith of statements contained in a prospectus dated February 11, 1920. The prospectus was expressed to be an offer for sale by Messrs. Sperling & Co., a firm of merchant bankers, therein described as the purchasers, of 3,000,000*l*. guaranteed first mortgage 7 per cent. debenture stock at 95 per cent., guaranteed as to principal, interest and premium by the Northumberland Shipbuilding Company and redeemable at 105 per cent. on or before February 1, 1940.

At the date of the prospectus, the Northumberland Shipbuilding Company had acquired all the share capital in Workman, Clark & Co., and some of the directors of the Northumberland Shipbuilding Company had become directors of Workman, Clark & Co. The old directors remained in office solely for the purpose of superintending certain existing contracts and retired shortly afterwards.

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(1) [1928] N. I. 162.

In 1926 the respondent brought an action against the directors of Workman, Clark & Co., the members of the firm of Sperling & Co., and the Northumberland Shipbuilding Company, claiming (*a*) against all the defendants damages for fraudulent misrepresentation in the prospectus; (*b*) in the alternative, against the defendant directors compensation under s. 84 of the Companies (Consolidation) Act, 1908, for loss sustained by the respondent by reason of untrue statements in the prospectus; (*c*) in the further alternative, against all the defendants damages for conspiracy to defraud the respondent and other subscribers to the debenture stock, and the respondent claimed one sum of damages—namely, 178*l.*—in respect of all these claims.

The substantial grounds of complaint were that the assets of Workman, Clark & Co. had been greatly over valued in the prospectus and that the proceeds of the debenture stock had been improperly applied in paying for the shares in Workman, Clark & Co. acquired by the Northumberland Shipbuilding Company, to the detriment of the respondent and other subscribers to the debenture stock.

The facts are fully stated in the judgment of Viscount Sumner.

At the trial of the action before Brown J. and a special jury the learned judge, at the close of the respondent's case, held, as to claim (*a*), that there was no evidence to go to the jury as against the old directors; as to claim (*b*), that no liability on the part of any of the defendants was incurred under s. 84, inasmuch as the offer for sale was not issued by or on behalf of Workman, Clark & Co., but by Sperling & Co.; and as to claim (*c*), that there was no evidence to be left to the jury as against any of the defendants; and he dismissed the action as against the old directors with costs. When the case came on for hearing again as against the remaining defendants in respect of claim (*a*), these defendants obtained leave to amend their defence by paying into Court, with a denial of liability, the sum of 130*l.* in respect of that claim, on the terms of paying to the respondent his general costs of the action, including the costs of claim (*a*), and this sum was accepted by the respondent in satisfaction thereof. The learned judge then directed judgment to be entered for these defendants on claims (*b*) and (*c*).

At the time of the trial the Northumberland Shipbuilding Company was in liquidation, and it had since been dissolved.

The respondent appealed.

The Court of Appeal in Northern Ireland, being of opinion that there was a case to go to the jury against all the defendants on all the claims, set aside the judgments of Brown J.; but they held that the plaintiff's acceptance of the money paid into Court in satisfaction of claim (*a*) was a bar to any further proceeding for damages in respect of the same cause of action, and this was not contested by the plaintiff. As to claim (*b*), the majority of the Court (Andrews L.J. dissenting) granted a new trial on the ground that "compensation" in s. 84 implied something more than damages and that, there being evidence of additional loss, the defendants were not released from liability under the alternative claims by reason of the satisfaction of claim (*a*). As to claim (*c*), the Court unanimously granted a new trial. As to the costs of the action, the Court of Appeal declared that the plaintiff was entitled to his costs, up to and including the date of the first judgment of Brown J. in favour of the old directors, as against all the defendants, and, from the date of the first judgment up to date of the second judgment in favour of the remaining defendants in respect of claims (*b*) and (*c*), as against the remaining defendants only, and the appeal was allowed with costs.

At various stages in the litigation certain of the defendants had ceased to be parties. Of the remaining defendants the appellants in the first appeal were old directors of Workman, Clark & Co.; the appellants in the second appeal were new directors of the company or members of the firm of Sperling & Co.

1929. June 10, 11, 13, 14, 17, 18, 20, 21, 24. *The Right Hon. H. P. Macmillan K.C.* (of the Scottish Bar) (with him *Stuart Bevan K.C.*, *J. H. Stamp* (both of the English Bar), and *Edmond Warnock* (of the North Irish Bar)) for the appellants in the first appeal. The plaintiff bases his claim for damages on three alternative grounds: (1.) fraudulent misrepresentations in the prospectus; (2.) untrue statements in the prospectus within s. 84 of the Companies (Consolidation) Act, 1908; (3.) conspiracy to defraud the plaintiff and other subscribers to the debenture stock. As regards (1.), acceptance of money paid into Court with a denial of liability by one of several joint tortfeasors puts an end to the action as against the other tortfeasors, and as to this claim no new trial was asked for and none could have been ordered. But, though the plaintiff has taken the money out of Court, he has persuaded the Court of Appeal to go into this matter. As regards (2.), the measure of damages must necessarily be the same as in claim (1.), and this claim also must be held to have been satisfied. The measure of damages under claim (1.) is the difference between the price paid for the shares or debentures and their real value at the date of allotment (*McConnel* v. *Wright* (1); *Broome* v. *Speak* (2)), and that also must be the measure of damages in the case of the statutory tort under s. 84. It is obvious that the measure of damages for an innocent misrepresentation cannot exceed the measure of damages for fraud: *Stevens* v. *Hoare* (3); *Geipel* v. *Peach*. (4) Further, there is no evidence of any misrepresentation within s. 84, because this was not an invitation by the company to subscribe for debentures, but was an offer for sale by purchasers from the company. As regards (3.), so far as the conspiracy resulted in inducing the plaintiff to purchase the debenture stock to his detriment the acceptance of the money paid into Court is a satisfaction of this claim also. So far as the conspiracy related to the period subsequent to the issue of the debenture stock it has reference to the misapplication of the company's funds and the action is misconceived. The damage to the plaintiff arises only indirectly through the wrong done to the company, and the company alone can sue for redress. The plaintiff has taken payment in full of all that he could have recovered

(1) [1903] 1 Ch. 546, 558.
(2) [1903] 1 Ch. 586, 605.
(3) (1904) 20 Times L. R. 407.
(4) [1917] 2 Ch. 108.

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on any of the claims and the action is at an end by his own conduct; and therefore the appeal to the Court of Appeal in Northern Ireland was incompetent. The action would have been at an end even if the money which the plaintiff took out of Court had been less than he was entitled to, for by taking the money out of Court his right to recover has passed into a different region. If the plaintiff had any further complaint he should not have taken the money out of Court: *Beadon* v. *Capital Syndicate* (1); see also *Goldrei, Foucard & Son* v. *Sinclair and Russian Chamber of Commerce in London.* (2)

W. A. Greene K.C. (of the English Bar) (with him *J. M. Whitaker K.C.* and *C. B. Marriott K.C.* (both of the North Irish Bar)) for the appellants in the second appeal. As to conspiracy, where, as here, the charge is a charge of defrauding a man of his money, the allegation of conspiracy adds nothing to the charge and is mere surplusage: per Lord Dunedin in *Sorrell* v. *Smith.* (3) The substance of the complaint under this head is that the defendants have devised a scheme for misapplying the funds of the company, with the result of depleting the plaintiff's security. But that is an infringement not of the debenture holders' right but of the company's right, and the company is the only proper plaintiff: *Gray* v. *Lewis.* (4) The plaintiff has mistaken his remedy. The plaintiff, instead of suing the directors for damages for fraudulent misrepresentation in the prospectus, might have disaffirmed the transaction and got his money back, but having elected to keep his debentures he keeps them with all their implications. He has defined rights as a debenture holder and those rights have their appropriate remedies, but he has no individual claim against persons who have defrauded the company. It is not a wrong to the creditor that somebody defrauds his debtor or that two or more persons conspire to defraud his debtor. Any damage caused to the plaintiff by the injury done to the company is damnum absque injuria. An action by a

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(1) (1912) 28 Times L. R. 394; 427.
(2) [1918] 1 K. B. 180.
(3) [1925] A. C. 700, 716.
(4) (1873) L. R. 8 Ch. 1035, 1050.

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creditor for an injunction to restrain directors from misapplying the funds of the company has never been heard of. Further, the doctrine of conspiracy has no application to a case of this kind. Conspiracy is only important where the act complained of is prima facie not a violation of a right, but may become so by reason of malice or spite. It is only really relevant in the case of general or undefined rights, such as the right to trade, as distinguished from defined rights, such as a right to property. This is shown by a long line of authorities from *Gregory* v. *Duke of Brunswick* (1) to *Sorrell* v. *Smith* (2), including *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3); *Allen* v. *Flood* (4); *Quinn* v. *Leathem* (5); and *Ware and De Freville, Ld.* v. *Motor Trade Association.* (6) Assuming that conspiracy is properly pleaded as a tortious act, the one essential mark of conspiracy, the intention to harm the plaintiff, is absent. It is not evidence of malice to say that the malversation of the company's funds may injure the individual. Tort is an infringement of a right, and you must first prove the existence of the right. Here no right of the plaintiff has been infringed. As to the claim under s. 84, there is no evidence upon which a jury could properly find that the document was issued by the authority of the company. As to the effect of the acceptance of the money paid into Court, satisfaction of a claim with alternative bases of fact is a satisfaction of the entire claim. The plaintiff having elected to plead in this form, must abide by his pleadings.

[At the conclusion of the arguments for the appellants Viscount Sumner stated that in their Lordships' opinion there was evidence fit to be presented to the jury that the prospectus was issued on behalf of the company.]

E. S. Murphy K.C. and *A. K. Overend K.C.* (both of the North Irish Bar) (with them *Comyns Carr K.C.* (of the English Bar) and *John H. S. Russell* (of the North Irish Bar)) for the respondent. There was here abundant evidence that the statements in the prospectus were (*a*) untrue, (*b*) to the knowledge of the defendants. It is objected on behalf of the first appellants that there was no jurisdiction in the Court of Appeal to deal with the judgment of Brown J. in their favour by reason of the acceptance by the respondent of the money paid into Court. But the effect of that acceptance is to stay the action, except as to costs, which are in the discretion of the Court (Rules of the Supreme Court (Ireland), 1905, Order XXII., r. 7, which is equivalent to the English Order XXII., r. 6), and if the Court has not exercised its discretion, that discretion may be exercised by the Court of Appeal: *Beadon* v. *Capital Syndicate.* (1) As to conspiracy, there is ample authority for the proposition that on the facts of this case the jury would be entitled to find a conspiracy, the necessary result of which would be to damage the respondent. There are here all the essential elements of an actionable conspiracy. The conspiracy starts with the fraudulent prospectus and is carried on by the withdrawal of the Workman Clark assets, which was an ultra vires transaction. In *Quinn* v. *Leathem* (2) FitzGibbon L.J. directed the jury that in an action of conspiracy they were not bound to limit the damages to the precise amount of the pecuniary loss caused to the plaintiff.

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(1) (1843–4) 6 M. & G. 205; 953.

(2) [1925] A. C. 700, 711, 712, 737, 744, 748.

(3) (1889) 23 Q. B. D. 598, 612, 613; [1892] A. C. 25.

(4) [1898] A. C. 1, 139.

(5) [1901] A. C. 495.

(6) [1921] 3 K. B. 40, 90.

[They also referred to *Ware and De Freville's* case (3) and *Sorrell* v. *Smith.* (4)]

As to s. 84, the measure of damages under this section differs from the measure of damages in the common law tort. The actual loss suffered by a person subscribing for debentures may be greater than the measure of damages prescribed by *McConnel* v. *Wright* (5), and that additional loss may be recovered under the word "compensation." As to satisfaction, the acceptance of the money paid into Court in respect of claim 1 is not a satisfaction of claims 2 and 3. The objection that the claims are described as alternative claims is not a point of substance.

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(1) 28 Times L. R. 427.
(2) [1901] A. C. 495, 498.
(3) [1921] 3 K. B. 40, 90.
(4) [1925] A. C. 700, 719.
(5) [1903] 1 Ch. 546.

The Right Hon. H. P. Macmillan K.C. replied for the first appellants.

W. A. Greene K.C. replied for the second appellants.

The House took time for consideration.

1929. July 24. VISCOUNT SUMNER. My Lords, the plaintiff is a Belfast coach builder who on February 12, 1920, subscribed for 200*l.*, part of an issue of 3,000,000*l.* 7 per cent. guaranteed first mortgage debenture stock of Workman, Clark & Co., Ld., and received an allotment of that amount, of which he is the holder still. On January 21, 1926, he sued Workman, Clark & Co., Ld., the Northumberland Shipbuilding Company, Ld., and a number of private persons whom it will be convenient to classify in three groups—namely, "the old directors," "the new directors," and "the Sperling partners." Two other persons, Frank Workman and Sir John Esplen, were joined but are not now parties. Against one the action abated on his death; against the other it was struck out without costs. Further the Northumberland Shipbuilding Company, Ld., is in liquidation and is not before your Lordships, and as against Workman, Clark & Co., Ld., the action was discontinued on terms in January, 1927.

Your Lordships are informed that this action is one of many similar actions and was selected by parties interested as the one to be proceeded with. Whether any of these other actions after all these years is still in being we do not know, but I ought to say that, in dealing with the facts of this case, I have desired to confine myself to the question whether there was evidence fit to have been left to the jury and not to prejudge or prejudice the result of any proceedings in the future, in which evidence in answer to it may be given. The plaintiff did not join any other debenture stockholders nor did he sue in any representative capacity. The old directors were directors of Workman, Clark & Co., Ld., in 1919 and held large amounts of the ordinary shares, which early in 1920 they sold to Frank Workman, acting on behalf of others. Thereafter, though they continued to be directors they held only the bare qualification shares and these only as nominees until they ceased to be directors early in 1921. These defendants are Sir George Clark, George Ernest Clark and Charles Edward Allan, the appellants in the first of the two appeals, which have been heard together by your Lordships. The new directors became directors of Workman, Clark & Co., Ld., on February 10, 1920, and continued to be directors at all material times thereafter. They are R. A. Workman, who was chairman of the Northumberland Shipbuilding Company, Ld., and Sir Mackay Edgar, one of the Sperling partners, six in all, who at the material times traded in London as merchant bankers, though their partnership has since been dissolved. The new directors and the Sperling partners together are the appellants in the second of these appeals. The plaintiff is the respondent in both.

His statement of claim alleged three causes of action. The first was in deceit for fraudulent misrepresentations contained in the prospectus, dated February 11, 1920, upon which he applied for the debenture stock. The third was for conspiracy to practice that deceit and to carry out at subsequent dates sundry dealings with the assets of Workman, Clark & Co., Ld., and other companies to the prejudice of the security for the debenture stock. The second was under s. 84 of the Companies (Consolidation) Act, 1908, for compensation for the falsity of the statements complained of as against all defendants who were directors of Workman, Clark & Co., Ld., when, as was alleged to have been the case, the prospectus was issued on the company's behalf. These are the defendants Edgar, R. A. Workman, the two Clarks and Allan. Against the old directors conspiracy was alleged only in regard to acts done before they ceased to be directors; otherwise all these persons were implicated in the charges of fraud and conspiracy. As a matter of pleading the second cause of action and again the third were alleged with the words "alternatively" or "in the alternative" prefixed, the particulars relied on in support of each cause of action were to a large extent the same, and damages, 178*l*. were alleged and claimed in one concluding paragraph applicable to all three, and stated in particulars to be so intended.

At the trial, on the conclusion of the plaintiff's evidence it was submitted on behalf of all the defendants by their respective counsel that there was no case to go to the jury as against any of them on any of the causes of action. As against the old directors the learned trial judge sustained the submission; as against the defendants, who are concerned in the second appeal, he held that there was a case to go to the jury in respect of certain of the alleged fraudulent misrepresentations but not in respect of any other cause of action. This was on November 24, 1927.

The next step is succinctly set out in para. 23 of the case of the appellants in the second appeal: "The trial of the action was to have proceeded against the appellants on 28th November, 1927, of so much of the first cause of action alleged in the statement of claim as the learned judge had ruled was proper to be left to the jury, but at the sitting of the Court on 28th November, 1927, these appellants applied for and obtained leave to amend their defence and, whilst denying liability, they brought into Court the sum of 130*l.* on their own behalf and also on behalf of the Northumberland Shipbuilding Co., Ld., in respect of the respondent's claim on the first cause of action, which sum the respondent accepted in satisfaction thereof. The sum of 130*l.* was the figure put forward by the respondent's witness, Mr. Arthur Collins, as the total amount of damage alleged to have been suffered by the respondent in respect of any of the said alleged causes of action, apart from a suggested claim for loss of interest, which these appellants submit was in any event irrecoverable." This stroke was skilfully timed. The plaintiff had now one group only, against whom to seek redress, and that on only one of his causes of action. He had to pay the old directors their costs; if he went on with the trial and failed to recover more than had been paid into Court he would also have to pay the other defendants' costs subsequent to the payment in. The proved damages having all been brought into Court, his legal right to more was, to say the least of it, precarious, and, if the Sperling partners or the new directors were to give evidence they might clear themselves altogether. Whether he recovered the 130*l*. by judgment in the action or took it out of Court in satisfaction, his claim against the other defendants, as joint tortfeasors, would disappear.

He made his choice, and obtained from the learned trial judge, as a condition of giving leave to bring the money into Court, an order for payment of his general costs of the action including the costs of the issues arising out of the prospectus claim, and, further, to guard against it being said that in effect the appeal was as to costs only, he got leave to appeal. He then took the 130*l*. out of Court in satisfaction and gave notice of appeal against the judgments, which had dismissed the old directors altogether and had disposed of the alternative causes of action. He asked to have them set aside and that a new trial should be ordered on the issues other than that of deceit as against all the defendants.

One other course was considered, an adjournment of the trial pending the determination of an appeal against the above mentioned judgments, but this was thought to be impracticable, and so I should think it was. Apart from objections, which were to be expected from the new directors and the Sperling partners, and possibly from the learned judge himself, on the ground of its great and general inconvenience, nothing but the consent of the Court of Appeal in Northern Ireland and, in case of a further appeal, of this House to a drastic expedition of the hearings could avert the probability, that in the ordinary course of nature the entire jury could not be reassembled for the adjourned trial, in which case, without the consent of the whole body of defendants, a new trial would be inevitable.

The plaintiff was advised, and very plausibly, to argue that the trial, so far as it had gone, had been made " abortive " in large measure by the course, which the successful defendants and the others had taken and that his costs thus thrown away ought to be paid by them, but the question remained whether this result was not entirely justified under the Orders and Rules. In any case how can defendants be required to

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pay costs on an issue, which the plaintiff never had proved and as to which he did not and could not ask for a new trial?

On appeal the plaintiff was successful, one Lord Justice dissenting on one point only. The Court held that there was evidence to go to the jury on the second and third causes of action as against all the defendants and that the trial should not have been interrupted. They held further that these causes of action had not been satisfied on taking the money out of Court, for it was paid in only to the cause of action for deceit and the other two—for one of which compensation, not damages, was recoverable by statute, while the gist of the other was not deceit but conspiracy to deceive—were not identical with the first nor incapable of leading to the recovery of further sums. Accordingly the plaintiff's rights and remedies were not exhausted but ought to be tried out against the old directors on the first issue and against all the defendants on the others. Although the first issue, the onus of which did not lie on them, had never been tried out, the old directors were ordered to pay the costs referable to it down to November 24, 1927, and the Court declared that the plaintiff was entitled to the costs of the trial already had, so far as referable to the other issues, down to that date against all the defendants, other than the Northumberland Shipbuilding Company, Ld., and Sir John Esplen, who were no longer parties. Against this the present appeals have been brought.

The questions evidently fall under three heads: (*a*) Ought the learned trial judge to have held that on any cause of action as against any of the defendants there was no evidence fit to go to the jury; (*b*) in view of the payment in and taking out of the 130*l.* in satisfaction of the first cause of action, was there any outstanding right in the plaintiff in respect of which a new trial could be ordered; and (*c*) were the orders, which were made against the defendants as to costs, or any of them, justifiable in principle.

The moment selected for the issue of the prospectus was peculiar. According to the secretary to Workman, Clark & Co., Ld., who was the plaintiff's chief witness, the latter part of 1919 and the first of 1920 was a period of great expectations. Everybody, "from the Prime Minister downwards," said so: as the result of the war shipbuilders had ten years of work before them. "Combines" were the order of the day and March, 1920, was the "peak of the boom." For a "combine" at such a moment Workman, Clark & Co., Ld., was a company with special attractions. Its long experience and success, its extensive clientèle, its reputation both local and world-wide, its well-equipped yards and its large undistributed assets, made it the very thing for those who construct combines. First to acquire control of it, next to attract the public, and thirdly to trust and lead others to trust in the future was the obvious scheme, legitimate enough in itself. Time, however, pressed; popular interest had to be caught at the flood, and the temptation to assure a quick success might easily override some scruples in the matter of accuracy. No persons could better appreciate all this than the directors, old and new.

The facts relating to the issue of the debenture stock and the participation of the various defendants have been closely examined, but before considering them the general character of the issue deserves attention. The stock, though a first charge and guaranteed by the Northumberland Shipbuilding Company, was a 7 per cent. stock, issued at a discount of *5l.* per cent., redeemable at the end of twenty years at a premium of *5l.* per cent., and strengthened by an annual sinking fund of 150,000*l.* As the whole share capital of Workman, Clark & Co., Ld.—namely, 43,200 shares of 25*l.* each, had been issued and fully paid and was little more in amount than one-third of this debenture issue, and as 210,000*l.* would be required annually for interest and 150,000*l.* for the sinking fund, all to be earned out of building large ships, it is evident from the terms offered that money was much needed somewhere. The existing securities, available for future business, were of the first importance, since the service of this issue must come out of trading profits in the first instance. It is true that there was the Northumberland Shipbuilding Company, Ld., behind it, but that company, though its shilling shares are said about this time to have gone to 2*l.* each, had its own business and its other acquisitions to provide for, and the prospectus did not give much information about it, except that its profits for the two years ending June 30, 1919, averaged 275,216*l.*, a figure "quite inadequate as a basis of future earnings." Shipbuilding requires either considerable working capital or considerable credit during construction, as well as extensive yards and plant. It is fairly evident that a prospectus would not appeal to sensible subscribers, if it stated that the company had just parted with all its realizable securities and did not propose to employ by any means the whole of the proceeds of the debenture stock issue in financing its proper business, yet this was the fact. It is evident also that some mention of the physical assets and realizable securities had to be made, since a total omission would be hardly less prejudicial than a candid explanation about them. How then did this carefully drafted document deal with them ?

It stated on the authority of Mr. Henry Boyd, M.I.N.A., that the physical assets were worth 4,012,100*l.*, no more no less, an estimate so precise as to imply prolonged deliberation ; and, on the authority of R. A. Workman, as chairman of the company which had just acquired all the ordinary shares, that on February 3 Workman, Clark & Co., Ld., had investments worth approximately 1,600,000*l.*, and it declared that, in addition to thirty-seven ships then on order, and in spite of the large amount of work then in hand, other work could be commenced at an early date and large profits might thus be expected. It stated in terms that the issue was charged on all the company's assets, though without prejudice to its right to dispose of them in the ordinary course of its business. An intending subscriber might reasonably infer that these investments and the proceeds of the issue were intact and would be available for financing these lucrative undertakings. He would never guess that the company had already disposed of them, not in the ordinary course of its business but because the Northumberland Shipbuilding Company, Ld., the guarantors so much in evidence, had paid for their purchase of the ordinary shares by realizing the securities and drawing on the proceeds of the issue, as they could not fulfil their bargain otherwise. Of course, if they proved in the future to be rich enough to secure the issue, principal, interest and premium, by their own resources, this would not ultimately matter, but an intending subscriber might quite probably think that in the meantime it did.

Now all the appellants knew these statements to be misleading and untrue and the old directors at any rate, whatever the others did, felt much compunction about it. They knew that Mr. Boyd's valuation was excessive; they knew that the company could not and was not meant to utilize these large realizable sums in building ships and securing the debenture stock. As instructed, Mr. Boyd had valued at the cost of replacing the plant, though a debenture stockholder wants to know what he can sell the plant for in case of need, not what it will cost him to replace it, if renewal at his expense should be required. The plaintiff's witnesses proved, if proof was necessary, that this basis was improper. The old directors were shocked at it, all the more as they knew that Mr. Boyd spent only twenty-four hours in Belfast altogether, when he purported to value so precisely 109 acres of land, containing twelve shipbuilding berths, with boiler-making shops and boiler shops and blacksmiths' shops and engineering works, principal and subsidiary, and an iron foundry as well, all fully equipped with machines and tools.

My Lords, I recognize that the position of the old directors differed in many respects from that of the new ones and their difficulties would have been well worthy the attention of a jury. They were not the leaders, as the others were, and perhaps they allowed themselves to be overborne. Still they had a personal interest in the success of the scheme, which they could perceive to be on foot, since it was through the scheme that payment for their shares was made, and there was evidence in the acts done by them to facilitate that scheme, without objection or inquiry, from which knowledge and assent to it, before it was carried out, might reasonably be inferred. The circumstances are briefly these.

For some little time before November 12, 1919, reports were going about that the business of Workman, Clark & Co., Ld., had been or was about to be disposed of. Sir George Clark contradicted them, but at a board meeting on that day, at which George Ernest Clark and C. E. Allan were present, he mentioned them, and it was proposed that an extraordinary general meeting of the company should be held for the purpose of considering the various schemes for the reorganization of the company. Although the proposal was not pressed, this discussion at any rate shows that something was already in the wind to the knowledge of the old directors. The minutes of this and of some subsequent meetings show, that there was a contest for the control of the company between Sir George Clark and his friends and a rival group, headed by the chairman, Frank Workman, which was ultimately terminated, on December 23, 1919, when the board unanimously agreed to accept the chairman as the purchaser of the Clark & Allan interests. This purchase, it was disclosed, was made on behalf of others, of whom the Northumberland Shipbuilding Company, Ld., was one and ultimately the only one, and eventually at a board meeting on January 13, 1920, attended by C. E. Allan and G. E. Clark, transfers of 34,668 shares (9020 being shares of Sir G. Clark) were passed and also a transfer of the same number of shares to two persons, who in fact were nominees of the London County and Westminster Bank. At the same time Messrs. Kleinwort, Sons & Co. were authorized to realize the company's investments, subject to the approval of Messrs. Sperling & Co.

So far as the minutes of these meetings go there was no discussion of the reason for these transfers or of the purposes, for which the authority was given to Messrs. Kleinwort, but, as the old directors still remained members of the board, I think that on this alone, in the absence of their explanations, the jury would be entitled to infer either that they knew the meaning and effect of these proceedings or that they were deliberately indifferent to them. The correspondence, however, which the defendants disclosed carried matters a good deal further. From this it appears that the price of 80*l.* per share was offered by F. Workman on the authority of Sperling & Co.; that Sir George Clark and C. E. Allan stipulated that they should remain as directors with authority to exercise supervision over vessels then on order, and that this stipulation was agreed to by R. A. Workman, chairman of the Northumberland Shipbuilding Company, Ld., and was given effect to, whereupon Sir George Clark withdrew his own offer to buy at 81*l.* per share and assented to the acceptance of F. Workman's offer of 80*l.*

My Lords, I do not forget that at first there was keen antagonism between Sir George Clark and Frank Workman on the question of control of the company and that after the sale of Sir George's shares their personal feelings are said to have been much the same as before, but this was a point for the jury. At any rate they are found concurring in business communications at a later date and Sir George Clark, who had obtained an interim injunction to restrain some of the steps in Workman's plan, elected to make no use of it but agreed to sell out himself. Considering that the total purchase money for the 34,668 shares transferred by Sir George Clark and his group amounted to over two and three-quarter million pounds, that the Northumberland Shipbuilding Company's balance sheet showed that it at any rate had no available assets for more than a small fraction of this amount, and that no other and more responsible persons appeared as purchasers in the documents disclosed, Sir George Clark and his friends had some reason to be concerned about payment of the price for the highly valuable property which they proceeded to transfer, unless indeed they knew quite well that in the process of tapping all resources, as Mr. R. A. Workman calls it, they would be provided for, as they were, by utilizing the realizable investments and the proceeds of the issue. However, they do not appear to have been anxious, nor was their confidence misplaced. On January 15, 1920, Kleinwort & Co. paid to Frank Workman the price of 42,246 shares against surrender of transfers and in due course the old directors were paid. Kleinwort & Co.

charged this sum to a special loan account in the name of the Northumberland Shipbuilding Company, Ld., and, although the proceeds of the sale of the company's investments were for a time duly credited to the company, it was eventually paid off from the sources I have mentioned.

Even with the materials disclosed by the defendants a jury would be fully entitled, and reasonably well informed for that purpose, to find that the old directors knew long before the date of the debenture issue, that it was to be the main source for the payments, in which they were so much interested. They furnished R. A. Workman with a full list of the investments of Workman, Clark & Co., Ld., with a balance sheet to August, 1919, and a cash statement to date, and on January 5 Sir George was informed that all arrangements were made to pay over the cash as soon as the papers were in order, "so that everything could be carried through next week." The knowledge of and concurrence in some scheme for a public issue which is thus far to be inferred, becomes more definite and the consciousness of the old directors that the proposed statements would never do becomes more explicit in the subsequent letters. On the 8th Sir George was told that the intention was to create debentures as soon as the purchase was completed, for which purpose Mr. Boyd was being sent to Belfast "to make up an independent valuation of present-day replacement value of physical assets." On January 19 C. E. Allan was informed that the secretary was busy handing over the securities to Messrs. Kleinwort, and ten days later the draft prospectus was in the hands of Sir George Clark and C. E. Allan and a telegram was sent in the name of Workman, Clark & Co., Ld.: "We would need to have an opportunity of going over details before authorizing its issue," while F. Workman telegraphed: "Neither I nor other directors could possibly let our names go on prospectus as it stands." It was to this that R. A. Workman replied that the company's solicitor advised that Workman, Clark & Co., Ld., had no responsibility whatever in connection with the prospectus, which was issued by Sperling & Co. For reasons which it might have been supposed that the jury would have heard from these directors themselves, they acquiesced in this view. They wrote along with F. Workman on February 5, 1920, to Sperling & Co., " although Mr. Boyd's valuation is in excess of our own ideas, we do not consider it necessary to press an objection to it," and they agreed, apparently with satisfaction, to the proposed statement, referring to a " conservative estimate " of 2,000,000*l.* for the profit to be made in 1920, 1921 and 1922, that " it will be understood that this estimate does not take into consideration any income from the company's investments or from the proceeds of the sale of the debenture stock now offered." They then corrected an error, which for some reason they call " technical," consisting in an under-statement of the company's annual tonnage output in the past and they conclude: "If you will send in a draft of the prospectus revised on these lines, we will return it at once after approval." In the absence of further explanations I think that a jury might, and probably would, have made three reflections on this letter. (1.) This is inconsistent with the prospectus being merely Sperling & Co.'s document: it points to its being, in the writers' view, a prospectus, which they as directors of the company have to consider and can either object to or approve. (2.) After full consideration it was in substance approved by them, and this was therefore some evidence that it was issued with their authority. (3.) To say that the estimate of profits, large as it is, does not take into consideration income from about four and a half millions of investments of the company and proceeds of the sale of its debenture stock is not a plain way of saying that there are no investments and that most, if not all, of the proceeds in question are to be used otherwise than in making profits by building ships at Belfast, and might be read by a hopeful investor as conveying that, in addition to profits from shipbuilding, the company's resources would be enhanced by income from existing and from future investments of millions of pounds.

Matters then went rapidly forward and the necessary meetings of the board and the shareholders were summoned for

February 10 in London. F. Workman asked Sir Mackay Edgar if any of the Belfast directors should come over and was told that there would be enough directors in London and they need not trouble. Whether he showed this to the old directors is not stated, though it is well to observe here once and for all that within each group the facts as to knowledge, notice and communications have been treated as common to all and no objection seems to have been taken at the trial or since to documents being read as if not only those named as parties to them but others in the same interest, who naturally would be aware of them, had been named so as to make them fully and technically evidence against the whole group. The fact in any case remains that the old directors did not trouble to come to London and the various resolutions, which led to the opening of the subscription list on the incriminated prospectus next day, were duly passed without them. On this part of the case I think there was evidence to go to the jury that the old and the new directors alike were parties to the issue of this prospectus to the public, having an interest in the subscription to the issue and knowing that it was to be invited on the faith of material statements which they knew to be untrue. It was for them to meet this charge by evidence if they thought fit. Various matters were pointed out by counsel as evidence of conduct inconsistent with the existence in the minds of the old directors of any intention to deceive. For example they subscribed for many thousands of pounds of the stock and took it up. Would they have parted with their money, if they had thought the prospectus misleading? They asked after the issue what had become of the proceeds of the company's investments and complained when they learnt that the money had been transferred to the Northumberland Shipbuilding Company. It is true that the objection in the latter case was to the fact that they had not been informed, not to the fact that the payment had been made. On the other hand the suggestion that the investment in the debenture stock was promptly got rid of was met by an apparently satisfactory explanation. All this, however, is

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rebutting evidence. I desire to convey no opinion adverse to its efficacy, but it was entirely for the jury.

My Lords, I turn now to the charge of conspiracy, as to which the view taken on the appeal was that wider damages would or might be recoverable than those recoverable for the deceit, so that the money in Court did not completely satisfy this cause of action. Two questions arise here: (i.) under the head of conspiracy may more acts causing mischief be proved and be the subject of money damages than under the head of obtaining subscriptions to a fraudulent prospectus, and (ii.) upon the same injurious act and in respect of the same mischievous consequences, may a jury deal out money with a more liberal hand in the one case than in the other? A third proposition was advanced during the arguments in this House—namely, that the evidence might be regarded as having disclosed two separate or at any rate several conspiracies, the first to deceive investors by getting them to subscribe on the faith of false representations and the second to injure them, after they had subscribed, by depleting the security and diminishing or destroying the value of the stock allotted to them. On all these points my answer must be "no."

On the pleadings as they stand—and they have never been amended in this regard, nor has any such amendment been applied for—only one damnifying act and only one conspiracy to cause that act to be done has ever been suggested, and, even so, only as an alternative to the cause of action in deceit. It is true that in giving particulars the plaintiff cast his net wide. His conspiracy was one which in the nature of things could only be collected by inference from overt acts, and his allegation of overt acts included many, which were only committed after, and sometimes long after, the date at which he sent in his subscription and parted with his money. Still the language of his claim is explicit—para. 5: "conspired to defraud the plaintiff among other persons, who might, and subsequently did, become subscribers to the issue of debenture stock of the said company, of their moneys," —and his particulars of March 21, 1927, say "under para. 7" (which asked for particulars of all three causes of action)

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"the difference between the present market price of the debenture stock and the par price thereof and such interest as the plaintiff would have but has not received were it not for the matters alleged in the statement of claim." Acts subsequent to the subscription were, or might be, relevant to proof of the concert in pursuance of which the prospectus was issued, the objects which it was to serve, and the existence of an intention to deceive, which lay behind the untrue statements in it contained. In their nature the facts pleaded and particularized did not go beyond matters identical in all these claims. Such I am sure was the whole purport of the evidence which was given in support of these particulars, nor do I think that anything was ever thought of but an alternative way of getting the same damages under another head of tort. I see no ground on which this claim can now be amended or enlarged. As to the measure of damages, it may be that there are cases in which proof that a joint tort was done in pursuance of a conspiracy to do it, will justify some increase of the damages to be awarded for the tort itself, though none such has occurred to me, but in the absence of any authority for such a course in connection with an action on a fraudulent prospectus I think that, before damages can be aggravated, there must be evidence that the actual wrong was attended by some circumstances of aggravation, or is so incapable of precise measurement that a jury must be left (within limits) to do what it thinks right between man and man. A plaintiff cannot be allowed, simply by using one technical term where another would equally cover his wrong, to aggravate the jury into giving him extra money not for any injury to himself but for the offence to their own sense of moral propriety. As to the view that there were two conspiracies and not merely one, I do not think, even if the necessary amendments in the pleading were to be allowed, that there was any evidence to support it. The evidence is strong and is uncontradicted that in 1920 the shipping and shipbuilding trades in the hope that excess profits duty was to be repealed built airy castles with a confidence that passes my understanding and when the budget of that year continued and increased it, contracts for ships to be built were cancelled, contracts for steel to build them with were broken, ships in being were unsaleable, financial accommodation was hard to come by and huge damages were incurred by shipbuilders and had to be faced and all sorts of bubbles burst, and it is in view of this that the subsequent charges must be considered. Apart from dealings with the proceeds of the issue, which completed that disposition of them, which was so contrary to the terms of the prospectus, I do not think that the events subsequent to the allotment constitute any evidence of any conspiracy. The acts were such as might be done by perplexed speculators, who have capitalized the future and then found that there was nothing in it, and have therefore turned to desperate devices in the hope of averting complete ruin. The persons concerned are not shown to have manipulated the interests of the debenture stockholders in order to profit themselves, and I think it was rightly submitted to your Lordship that, knowing little of these things and viewing them only afar off, we ought to beware lest we should mistake our uninformed disapproval of fancy finance for a penetrating detection of some dishonesty, artfully hidden from general view in the intricacies of the Companies (Consolidation) Act, 1908.

A further point was discussed, rather as an apprehension of the appellants' counsel than as an argument actually advanced for the respondent, that the mere act of conspiring is a wrong in itself, which would survive as a subject for trial and perhaps for general damages, even after the cause of action for actual wrongful acts, done in pursuance of it, has been satisfied. I do not think that any such question arises for decision, or that any hypothetical opinion on it would be opportune. Your Lordships will have observed that there is no evidence of malice against the plaintiff here, except such as is involved in the bare doing of a legal wrong. To the conspirators he was no more than a prospective and insignificant atom in a mass of possible investors, and in any case it was only his money that they wanted or another's.

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They had no feelings of any kind towards him. Again this is in no sense an act or series of acts done in combination and thus made formidable and wrongful, though, if done singly, they would have constituted no wrong at all. I therefore think that the point suggested may be left without opinion or decision.

My Lords, I think on the head of conspiracy there was evidence that the old directors combined with the other appellants to get from the plaintiff the amount of his subscription to the issue. It is true that in the particulars and in the evidence financial dealings between the various companies concerned and manipulation of their assets were included with which the old directors had little to do, but I think that apart from these there was enough to require that this alternative case should also go to the jury. For the reasons already given, however, it is in my opinion impossible to say that this cause of action was not, like the claim for deceit, fully satisfied by taking out the money, which had been paid into Court.

I wish further to add that, whether these subsequent financial proceedings were put as a new conspiracy or only as damage arising from the old one, additional to the loss of the money subscribed, in neither case were the proper parties before the Court to enable such matters to be gone into. The proceeds of the sale of the investments and of the debenture stock of the company were moneys of the company and the company was the party wronged by any misapplication of them. The debenture stockholders had the benefit of a charge over these moneys and were protected by the trustees of the debenture stock. They had other rights against Workman, Clark & Co., Ld., and against the Northumberland Shipbuilding Company, Ld., but action prejudicing the charge or the liabilities of the two companies was action directly injuring the whole body of debenture stockholders, as a body and pari passu, and affected them as individuals only indirectly. Unfortunately there would be no substance in any such proceeding. Workman, Clark & Co., Ld., are still in being, but holders of a prior lien charge have, in the exercise of their rights, sold all that company's assets and the legal liability in debt, as for a loan which very possibly existed when Workman, Clark & Co.'s millions were transferred to the Northumberland Shipbuilding Company, is a liability only, for that company is in liquidation and has no assets. No authority in any case was produced to show that a single debenture stockbroker could proceed in tort against persons, who had acted as directors either of the debtor company or of the company which owned all the debtor company's shares, and I think that in principle such an action, even if it were properly raised on the pleadings, could not be sustained. A representative action on behalf of all the stockholders, an action in the name or on behalf of Workman, Clark & Co., Ld., proceedings to compel the trustees to do their duty and take steps to protect the security, or proceedings against individual directors for misfeasance to the company give a sufficient and well established body of remedies, and I do not think this case can be moulded so as to enable the plaintiff to go beyond them.

My Lords, I think that there is a further ground on which a new trial ought to have been refused on any cause of action. After setting out his claim in deceit and his two alternative claims the plaintiff in para. 7 of his statement of claim proceeded to allege one sum of 178*l.* as the damages which he sought to recover, applicable to all three causes of action. He also called his evidence in regard to all three at once without discrimination or distinction. The witness, Mr. Collins, purported to have computed the difference, as at the time of the plaintiff's application, between the sum which he paid for the debenture stock applied for and the real value of the stock allotted to and retained by him, on the footing that the subsequent dealings with the security and the real state of the facts, without the misrepresentations or concealments contained in the prospectus, were all known and taken into account. It may be that his calculations left something to be desired, and one part of them he frankly abandoned, but he had had the opportunity of putting an estimate

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on the sum to be deducted to represent the value of the stock retained, and this ought to have taken account of the fact that interest was paid until default occurred, and that a moratorium was then granted by a resolution of a meeting of debenture stockholders, which bound the plaintiff. For any other purpose questions of interest on the debenture stock do not arise, since interest is the company's debt to its stockholders not an independent item of damages, recoverable by a party deceived from persons who misled him. A claimant, furthermore, must prove and recover damages, arising from one and the same cause of action, once for all: he cannot claim principal in one proceeding and interest in another, yet, if a new trial were granted on the suggestion that the amount paid into Court did not extend to interest but left it outstanding, which in my opinion is not the fact, this would be what we should be enabling the plaintiff to do. I am therefore unable to agree with the conclusion of the Lords Justices that, after the money in Court had been taken out in satisfaction, any cause of action or any head of damage remained unsatisfied, of which there was any evidence or which could be ordered to be tried anew.

Separate considerations affect the cause of action under s. 84 of the Companies (Consolidation) Act, 1908. Speaking broadly, I am of opinion that there was evidence to go to the jury, that the prospectus was issued on behalf of Workman, Clark & Co., Ld., or in other words I dissent from the view that it was entirely the prospectus of Sperling & Co., with which the directors of the company had, as such, nothing to do. It is true that the prospectus was called an offer for sale and stated that Sperling & Co. had purchased the entire debenture stock issue and were now inviting offers from sub-purchasers, but the question whether this was true was one for the jury. A letter was read at the board meeting of February 10, 1920, in which Sperling & Co. purported to make such an offer, but the resolution accepting it was not communicated to Messrs. Sperling before the prospectus came out next day but only on February 23, after the issue had been fully subscribed and allotted. A jury might infer some previous and different arrangement to have been in existence. At any rate when the prospectus came out nothing had been allotted or transferred, nor had Messrs. Sperling & Co. any document of title of their own to transfer to their buyers, nor did they pay any portion of the price. Allotments were made by the company to the applicants direct and Sperling & Co., whose offered payment for their purchase of the issue was not exigible till March 31, deducted 3 per cent. "commission" from the proceeds of the issue before paying them over in accordance with instructions from the company's officers. They provided the underwriting and brokerage services for this commission but otherwise the expenses of the issue were borne by the company, and the procedure was such as would have been equally applicable to agents, employed to bring out and finance the issue and simply paid for those services. On the other hand the direct share in preparing the prospectus, which was taken throughout by the old directors and in a still greater measure by the new ones (Sir Mackay Edgar being also the partner in Sperling & Co., who had this business in hand on their behalf), is much more indicative of an issue by and on behalf of the company itself. This question also was one for the jury to decide. There was at any rate evidence for them that the prospectus invited persons in the plaintiff's position to subscribe for the company's issue of debenture stock and, if so, the old directors and the partners in Sperling & Co. who through their partner Sir Mackay Edgar had authorized the issue and R. A. Workman and Sir Mackay Edgar, as persons who were named as directors with their authority, were liable to pay "compensation" under s. 84. A defence might have appeared, if the case had proceeded, but as the evidence stands the prospectus was issued with their knowledge and consent and they were aware of the misstatements which it contained and, in the case of Mr. Boyd's valuation, had no reasonable ground for believing that he was competent to make it. All these directors had been parties to the purchase of the shares in Workman, Clark & Co., Ld., for 3,456,000*l.*, a price which entitled the holders not only to the yards and the physical plant but also to the goodwill, and the investments, and this value was arrived at in competition. They knew therefore that Mr. Boyd's valuation of the physical plant alone greatly exceeded this sum and the sight of his figures shocked the consciences at any rate of the old directors.

So much for the evidence of liability. That liability gives rise under the section to a right to "compensation." With great respect to the Lords Justices, who held otherwise, I cannot hold that compensation here is, either as to the amount recoverable or the mode of measuring it, something different from and even greater than damages. Very shortly after the Directors Liability Act of 1890 was passed, which is reproduced in s. 84 of the Act of 1908, it was stated on high authority that the object of it was to give, as against persons who came within its terms, the remedy which the final decision in *Derry* v. *Peek* in this House (1), had limited to those who could prove a case of deceit, and this has since been generally adopted, and in my opinion is correct. I can understand that the Legislature deemed it necessary, as a matter of policy, to make certain persons liable for false statements in a prospectus, even though they did not know them to be false. I can understand that the word "compensation," which has no technical significance to the contrary, was selected because it represented the difference between the actual value of the debentures taken and the sum paid for them on the face of the prospectus, and at the same time avoided the invidious association of damages with dishonesty in such a connection. What I cannot understand is how the Legislature should have thought fit to impose on a director, who has authorized a misstatement innocently, a larger liability than falls on one who has done it in order to cheat, or to put it in the power of a plaintiff to get more money by omitting a charge of fraud than he could get by proving it. Again, if for some inscrutable reason such was the policy adopted, I cannot see why this gross difference was made to lurk in the use of a colourless and inoffensive word like "compensation." Great as is the difference between the elements, which constitute the two causes of action, the injury to be made good to the plaintiff is the same, and I see no reason for measuring it in one way in the one case and in a different way in the other. I am accordingly of opinion that on this issue, as on that of conspiracy, though the case should have been left to the jury, there was nothing left to be tried after the plaintiff had taken out in satisfaction money paid in on the first issue only. I do not profess that this works ideal justice, and I regret it, but such, in my opinion, is the result according to law.

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(1) (1889) 14 App. Cas. 337.

In view of these conclusions the question of costs, which are large in amount, becomes intricate and difficult. An objection was raised to the competency of any appeal from the trial judge on the ground, that, as a consequence of the payment in and out of the 130*l.*, no new trial was possible, for all causes of action were satisfied and no other relief was asked or could be given. I shrink from such a conclusion. So many days have surely not been spent in the Court of Appeal in Northern Ireland and in this House in discussing a non-existent or academic issue. Not until to-day is the conclusion judicially arrived at, that such was the result when the 130*l.* was taken out; meantime the question was more than arguable. It was decided in the respondent's favour by a majority of the Lords Justices. Was he entitled to assert a case, which prima facie was right, only on peril of the whole appellate procedure becoming abortive ex post facto if the final conclusion should go against him? If the appeals were incompetent throughout, where is the jurisdiction to deal even with the costs of them? An order had been made against the plaintiff, which was wrong at its date and which burthened him with costs payable to the old director appellants, and except by an appeal he could not be relieved. It seems to me that the order must have been appealable, unless and until he showed by his subsequent conduct an unequivocal and actual intention to acquiesce in it, and any appeal on this point opened and involved all the questions that we have discussed here.

If then the orders of Brown J. made on November 24, 1927, were wrong, they are as if they had not been made at all. In that view what should have been done on the application for leave to amend and pay into Court ? On that occasion terms might have been imposed, which would have provided, in the plaintiff's favour and at the cost of the then applicants, for the position in which he stood. He had incurred costs, both his own and the old directors, unless he got the verdict of the jury. This was not done then and in my opinion we cannot do it now, for non constat that those, who then sought to pay money in, might not have refused to submit and have elected to withdraw their application altogether, while they still could do so. Still the situation thus arising is not one, which no one but the trial judge had jurisdiction to deal with, nor is this House incompetent to make the order that should have been made in the trial Court. Unless there is incompetency, the balance of convenience is overwhelmingly in favour of your Lordships doing so, and I will proceed on this footing.

I think that the order of the Court of Northern Ireland should be varied, by discharging so much of it as ordered a new trial, but otherwise should be affirmed, and as to the costs of the appeal that the plaintiff, who succeeded as to the more expensive part of the argument, should be paid half his taxed costs and should himself pay none, while, as to the costs of and connected with the trial, I think that he should pay to the old directors their costs of the action referable to the issue of deceit, and should recover such costs over against the other defendants, but that, on the claims for conspiracy and under s. 84 of the Companies Act, judgment should be entered for the defendants without costs. As to the costs of this appeal, I think that success and failure being fairly evenly divided, and apportionment of the costs according to issues being probably uncertain in its operation, and certainly costly and slow, there should be no costs on either side, and I move your Lordships accordingly.

Lord Blanesburgh. My Lords, the noble Viscount on the Woolsack has detailed so fully, albeit so succinctly, the facts of this most complicated case that, adopting his phraseology, I can express very briefly the conclusions upon the appeal at which I have arrived. In the main I am in entire accord with the views enunciated by my noble friend. I have reached a different conclusion on one matter only—that relating to the responsibility of the old directors.

As to them, while for one reason alone, I am not prepared to say that upon the prospectus issue no case was made against them calling for an answer, I am satisfied that on the issue of conspiracy they were fully entitled to be exonerated at the close of the plaintiff's case.

At every stage of the story, as I see it, there is a great gulf fixed, not only between the old directors and those new directors who have been made defendants, but, although in a lesser degree, between them and the new directors who have not. If you have regard to the complete absence at the date of the prospectus of any pecuniary interest of theirs either in the company or in the combine; if you recall the very minor part they played in connection with the prospectus, and the very plain intimation they received that excessive intrusion in relation to it would be out of place on the part of persons in no way responsible for it, you see the complete separation between them and their co-defendants. If again, when the conduct of affairs of the company was taken over by the new board, directly responsible to the Northumberland Company as the owner in equity of all the shares, you note their absence, if not their exclusion, from the councils of the company and combine, and their activities confined to the supervision of the company's shipbuilding operations at Belfast, so that the confidence of old clients might remain justified; and if lastly you have regard to their final retirement from every office before some of the transactions to which the greatest exception has been taken in these proceedings were even contemplated—I would instance the acceptance of 2,500,000 second preference shares of the Northumberland Company in satisfaction of a debt of 2,500,000*l.* and the assumption of a large part of the liability in relation to the broken contract for purchase of the Baldwin shares entered into by another company altogether—you see how completely these old directors stand apart alike from the new directors and from those other persons who, through the Northumberland Company, the ultimate depository of power, controlled the destinies of the combine and of every one of its constituent companies.

I cannot myself find any evidence that any one of these old directors ever desired to bring their company into any combine or that in the conduct of the combine ultimately formed they either participated or desired to participate. So soon as their battle for control of their own company was lost by the acceptance of Mr. Workman's offer and the purchase of their shares in it, their serious intervention in the company's affairs, except to the extent reserved by the resolution of December 23, 1919, ceased. On January 15, 1920, nearly a month before the prospectus was issued, all their shares had not only been parted with, but had been paid for. Thereafter their pecuniary interest in the company disappeared. Even the twenty-five qualification shares, of which they remained the holders, were the property of Mr. Workman or his nominees. These shares had also been paid for. It has never been suggested that these directors have ever had even a scintilla of interest in the Northumberland Company, or any other unit of the combine, or any further interest in the Workman company, save that between them they subscribed for nearly 59,000*l.* of the debenture stock, which they took under the very prospectus by which the plaintiff alleges they deliberately sought to defraud all the subscribers. By common consent one peculiarly shabby charge made against them in relation to their subscription of this debenture stock may now, I think, be said to have been abandoned. But its abandonment makes the above statement of their position complete.

That statement appears to me of itself to go far to negative the idea that they would consciously put their hands to a prospectus of this debenture stock which they knew to be false and fraudulent. So strongly indeed do I feel on this head that but for one letter of theirs I would have been prepared to hold, not without confidence, that the learned trial judge was right in withdrawing, as against them, this issue from the jury. I refrain from taking that course only by reason of their letter of February 5, 1920, to which my noble friend has referred. These directors may well be able to explain that letter in a sense entirely compatible with their honour and integrity in relation to the prospectus. But it calls for an explanation, and until explained it was, I think, fit for the consideration of the jury. Although not without some hesitation, therefore, I concur in the view that, so far as they were concerned the order of the learned judge of November 24, 1927, on this first issue was mistaken.

On the issue of fraudulent conspiracy, however, so far as that is additional to the charge on the prospectus, my conclusion is different, although in view of the result on this issue reached by the noble Viscount it would be unprofitable that I should set forth at length my reasons for it already, perhaps, foreshadowed. I confine myself merely to saying that I can find on this issue of fraudulent conspiracy no evidence against the old directors fit to be submitted to the consideration of any jury.

In these circumstances, so far as the substantive order of the House is concerned, while concurring in the main result, I should desire, and submit it would be right, that no order for payment of any costs by the old directors, either in the Courts below or in this House, should be made. Any costs awarded to the respondent should, I think, be paid by the other appellants. Except to that extent, I am quite content with the motion which my noble friend proposes to make.

LORD ATKIN. My Lords, it is necessary to state the issues raised by the pleadings in order to extricate this case from the tangled web in which we find it involved. The plaintiff, in his statement of claim, included three causes of action which he pleaded in the alternative. First, he claimed against all the defendants damages for fraudulent misrepresentations contained in a prospectus whereby he was induced to subscribe for two debentures of 100*l.* each in Workman, Clark & Co., whom I will hereafter call the company. Secondly, he claimed against those defendants who were named in the prospectus as directors of the company, compensation under s. 84 of the Companies Act, 1908. Thirdly, he claimed against all the defendants damages for a conspiracy to defraud him as one of the class who might become subscribers to the debenture issue, the overt acts alleged being the issue of the prospectus with its fraudulent misrepresentations and further acts which stripped the company of the assets upon which the debenture holders had to rely for their security.

The action duly came on for trial before Brown J. and a special jury. The defendants, or groups of them, were separately represented: for the purposes of this opinion, the only groups I need mention are the directors who have presented the first appeal, whom I will call for the purposes of this case the Clark directors: and the appellants in the second appeal, whom I will call the Sperling group, though they include Mr. R. A. Workman, not a member of the Sperling firm but chairman of the Northumberland Shipbuilding Company. The plaintiff, after eight days, concluded his evidence, whereupon counsel for the Clark directors submitted that there was no evidence to go to the jury against them on the claim for deceit on the ground that there was no evidence that they had issued the prospectus and so made the representations complained of. On November 21, 1927, the judge so held. On November 24 he proceeded to consider submissions on behalf of all the defendants that there was no evidence to go to the jury against any of them on the remaining issues.

The judge held that there was evidence against the Sperling group on the claim for deceit, but held that there was no evidence against any of the defendants on the claim under s. 84 and for conspiracy. On November 24 a formal order was drawn up dismissing the action with costs against the Clark defendants. No formal order was then drawn up against the other defendants. Pending the arguments and decisions on these points, the attendance of the jury had from day to day been excused. On Monday, November 28, the case was again down for hearing. By this time, as the result of the judge's decisions, the Clark directors were no longer before the Court; the action had been dismissed against them with costs, while as to the remaining defendants, the Sperling group, the only matter that remained to be tried was the claim for deceit. When the Court sat counsel for the remaining defendants asked for leave to amend their defence by paying into Court, with a denial of liability, 130*l.*, in satisfaction of the claim for deceit. Something may have to be said later as to the adequacy of this sum to satisfy the other causes of action: but it is clear that both sides considered that 130*l.* was the full sum which the plaintiff had proved as damages for this, the only remaining cause of action. Counsel for the plaintiff therefore signified his intention to accept the sum paid in in satisfaction of the claim for deceit, on condition that the remaining defendants paid to the plaintiff the general costs of the action, including the costs of the issue as to deceit, a condition which was apparently accepted by the defendants: and at any rate was imposed by the judge. The only remaining issue being thus disposed of the action came to an end and the jury were discharged.

A formal order was drawn up dated November 28 giving effect to the proceedings of November 28 and to the judge's previous decision on November 24 by giving judgment for the Sperling defendants on the claims under s. 84 and for conspiracy with "the costs of action in the issues arising thereon." So far all is simple and no objection can be taken to the orders made, if the decisions of the learned judge on November 21 and November 24 stand. But the plaintiff appealed against the orders of the learned judge that there was no evidence to go to the jury against the Clark directors on the claim for deceit and against any of the defendants on the claims under s. 84 and on conspiracy. These appeals came before the Court of Appeal in May, 1928. The Court were unanimously of opinion that there was evidence to go to the jury against all the defendants, on all the causes of action. I agree with that opinion. Inasmuch as the issues raised may have to be tried in other actions I refrain from any detailed examination of the evidence, of which the Lord Chief Justice made a sufficient survey. But as the contention was put forward in this House on behalf of the Clark directors, which was not apparently made before the trial judge, that, even if there were evidence that they were parties to the issue of the prospectus, there was no evidence of fraud on their part, I think it necessary to say that in my opinion there was evidence to go to the jury sufficient, if unexplained, to justify them in concluding that these directors were aware that the statements were untrue that the investments and the proceeds of the debenture issue were available as security for the debentures, and that the "physical assets" were of the value of 4,000,000*l.*

The Court of Appeal were therefore right in setting aside the judgments entered by Brown J. for the Clark defendants as to all the causes of action and for the defendants on the claim under s. 84 and for conspiracy. The consequential orders would have been simple if the difficulty caused by the acceptance in satisfaction of the 130*l.* paid into Court had not existed. Without that the proper order would have been to direct a stay of the action against the Clark defendants on the cause of action for deceit, exercising a discretion as to the costs of those defendants, and directing a new trial as to the remaining causes of action with proper direction as to costs already incurred. In substance I think this is what the Court of Appeal did; they granted a new trial of the remaining issues and ordered the defendants to pay the costs of the trial already had, and they ordered the Clark directors to pay the costs of the issue as to deceit up to November 24, when that cause of action was dismissed against them.

I think that criticism might be directed against both these orders as to costs on the ground that the order to pay the costs of the remaining issues already incurred should be limited to costs thrown away, and that it seems hard measure to order defendants to pay the costs of an issue of fraud the trial of which has been stayed by the action of their co-defendants and the plaintiff, in respect of which, therefore, without fault of their own, they have been deprived of an opportunity of vindicating their innocence.

If the matter rested there I am not prepared to say whether the exercise of the discretion of the Court of Appeal in these matters could have been reviewed on appeal after the recent decision of this House in *Campbell (Donald) & Co., Ld.* v. *Pollak.* (1)

I think, however, that the acts of the Sperling defendants in paying in 130*l.* in satisfaction of the cause of action for deceit, and of the plaintiff in taking the sum out in satisfaction, had more serious result on the action than was attributed to them in the Court of Appeal.

My view of the position so created is as follows: The case must be considered as though the rulings of Brown J. on the evidence had not been made, and as though all the parties were before the Court on all the issues. The effect of taking the money out of Court is to stay the proceedings as to the cause of action in respect of which the money has been paid in, except as to costs. The plaintiff is entitled to his costs against the paying defendants unless the judge otherwise orders. As to co-defendants not parties to the payment, the proceedings are in a like manner to be stayed against them, but the judge has a discretion as to their costs. This is the effect of the express rule, Order XXII., r. 8 (A), introduced in 1913, in English Procedure; but though no such express rule has been made in North Ireland, the rule appears to do no more than give effect to the decision of the English Court of Appeal in *Beadon* v. *Capital Syndicate* (2), based upon the former English rules which for this purpose were identical with the Irish rules. This cause of action is therefore disposed of: there is no judgment on the issue of liability for either side: though there may be a judgment for costs. What is the effect upon other causes of action included in the same action? It was suggested to us that the statement of claim was so drawn that the several causes of action are alleged alternatively in the sense that they are mutually exclusive: so that if the plaintiff succeeded on one he could no longer pursue the other.

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(1) [1927] A. C. 732.
(2) 28 Times L. R. 427.

I think that this would be to put too narrow a construction on the pleadings. In the present case, however, where the position was that the plaintiff, by the erroneous decision of the judge given at the defendant's instance was left with only one cause of action, his action in causing the proceedings in that claim to be stayed should not be used so as to preclude him from proceeding with the other causes of action if otherwise permissible. As the Lord Chief Justice said, it would be open to him to ask for a verdict on both the remaining causes of action and then elect what judgment he should take. The result is that unless the sum of money accepted by the plaintiff was the equivalent of the total damages he might recover on the remaining causes of action he was entitled to proceed. The payment into Court as a matter of law only affects the particular cause of action to which it is pleaded. It may, however, amount to such a sum as to satisfy any damage that the plaintiff has suffered on any of the causes of action. If so, it would appear that the plaintiff must fail in any subsequent proceedings; for damage is an essential part of the cause of action and if already satisfied by one of the alleged tortfeasors the cause of action is destroyed. I have come to the conclusion in this case that the plaintiff in receiving the 130*l.* received the full amount of damages which on this trial he could have received on any cause of action. The pleadings make it clear that he claimed an identical sum in respect of each cause of action.

He called evidence in proof of damage, and Mr. Collins, an accountant, constructed a table which was intended to indicate the damage suffered on all three claims. At one stage the plaintiff clearly suggested that he had suffered an element of damage for conspiracy which went beyond the damage for deceit, but on investigation this particular item was admitted to be ill-founded and was withdrawn. In the result I think that the plaintiff in this trial rested on the evidence of damage given by Mr. Collins, which did not exceed the 130*l.* accepted in satisfaction of the claim for deceit. It seems to me to follow that the plaintiff could not have recovered more than that sum in respect of either of the remaining causes of action; in other words, that his damage had been satisfied by the defendants or some of them.

As far as the claim on s. 84 is concerned, I am of opinion that the measure of damages on such a claim is precisely the same as in an action of deceit; and in this respect I agree with the judgment of Andrews L.J. In my judgment the effect of the section in the original Directors Liability Act was merely to eliminate the element of fraud from the cause of action based on misrepresentation in a prospectus, and to give the same remedy in the statutory conditions for an untrue misrepresentation as for a fraudulent misrepresentation.

I wish to make it clear, however, that in my opinion it does not follow that because the measure of damages is the same acceptance of a sum paid into Court in satisfaction of the one satisfies the other. Some of the defendants might have paid in a sum of 10*l.* with a denial of liability in the claim for deceit, and the plaintiff might have accepted it rather than pursue the charge of fraud. I see nothing to prevent him from proceeding with the claim on the section though eventually in his damages he would have to credit the 10*l.* The reason for the present decision is that the 130*l.* paid in the one claim represents the full sum that could have been recovered on the other. Similarly, in the claim for conspiracy, I am far from saying that on different evidence a claim for more damages than 130*l.* might not have been established. In the present case I do not think that the plaintiff could have recovered more than the 130*l.*

I desire for myself to disclaim any intention in this case to decide what is the true measure of damages in an action for deceit of this kind. Both parties have accepted the measure of damages laid down in *McConnel* v. *Wright*. (1) I find it difficult to suppose that there is any difference in the measure of damages in an action of deceit depending upon the nature of the transaction into which the plaintiff is fraudulently induced to enter. Whether he buys shares or buys sugar, whether he subscribes for shares, or agrees to enter into a partnership, or in any other way alters his position to his detriment, in principle, the measure of damages should be the same, and whether estimated by a jury or a judge. I should have thought it would be based on the actual damage directly flowing from the fraudulent inducement. The formula in *McConnel* v. *Wright* (1) may be correct or it may be expressed in too rigid terms. I reserve the right to consider it if it should ever be in issue in this House.

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(1) [1903] 1 Ch. 546.

Having reached the conclusion that if the plaintiff proceeded with the alternative claims he must fail on the ground that his actual damage was satisfied, I have to consider what order should be made. It seems to me impossible that a new trial should be ordered, and I think the orders to that effect of the Court of Appeal should be set aside. The matter should be now finally disposed of, and I think that the right order is that judgment should be entered as of November 28, 1927, for the defendants on the claims under s. 84 and for conspiracy. I think that technically the defendants would find it necessary to plead to those causes of action that since action brought the plaintiff's damages had been satisfied by some of the defendants by the payment into Court of 130*l.* on the action for deceit and its receipt in satisfaction, and on such plea the plaintiff could confess judgment and tax his costs unless otherwise ordered. The opinion of Lush J. to the contrary in *Beadon* v. *Capital Syndicate, Ld.* (2), appears confined to the case where there is one cause of action only, and money has been paid in by some only of the defendants sued in that cause of action. So restricted I think it is right. At this stage, however, in this House it does not seem necessary to insist upon a formal amendment. If it were made it would not be right in the special circumstances to allow the plaintiff to have his costs of issues of misrepresentation and conspiracy which have never been tried. On the other hand the defendants have undoubtedly contributed to the confusion

(1) [1903] 1 Ch. 546.
(2) 28 Times L. R. 394.

by wrongly asking for judgment. If all the defendants had been before the Court on November 28 when the terms upon which the costs should be dealt with were before the trial judge, I have little doubt that the plaintiff would have asked for and might have obtained some order against the Sperling group covering the costs which he might have to pay to the Clark directors as the result of the action being stayed. We cannot revise the conditions on which the amendment to the pleadings was granted, but we can now exercise the discretion as to costs which the learned judge would have had when the payment into Court was accepted if all the defendants had been, as they ought to have been, before him.

LORD TOMLIN (read by LORD THANKERTON). My Lords, these two appeals arise in an action for damages begun by the respondent in the High Court of Justice, Northern Ireland, King's Bench Division.

The respondent applied for and was allotted debenture stock of the nominal value of 200*l.* of Workman, Clark & Co., Ld., a Belfast shipbuilding company. He applied for the stock upon a prospectus which was issued on February 11, 1920. In his action he seeks to recover damages (which he quantified in his statement of claim at 178*l.*) on the ground of fraudulent misrepresentation in the prospectus or alternatively on the ground of untrue statements in the prospectus entitling him to compensation under s. 84 of the Companies (Consolidation) Act, 1908, or alternatively on the ground of a conspiracy on the part of the defendants to defraud him and the other subscribers of their money.

As the statement of claim was framed therefore three alternative causes of action leading up to one and the same loss to the respondent were alleged and relied upon.

The defendants to the action were numerous. Some of them have since disappeared from it. The action was discontinued against the defendants, Workman, Clark & Co., Ld. (whom I shall call the Workman Company), before the action came to trial. Another defendant, the Northumberland Shipbuilding Company, Ld. (whom I shall call the

Northumberland Company), went into liquidation during the pending of the action and has since been dissolved. Frank Workman, another defendant, died before the action came to trial, and the action was, on January 17, 1927, discontinued by consent against yet another defendant, Sir John Esplen. The remaining defendants are appellants before your Lordships' House.

In order to make intelligible the position in the litigation of the several appellants, a short statement of the transactions which led up to the action and of the course which the action has taken is necessary.

The Workman Company was in the year 1919 a prosperous shipbuilding company long established in Belfast. The appellants, Sir George Smith Clark, Charles Edward Allan and George Ernest Clark (whom I shall call the first appellants) and the deceased defendant, Frank Workman, were directors of the Workman Company.

In the latter part of the year 1919 a scheme was carried through whereby the Northumberland Company acquired the whole of the share capital of the Workman Company and the whole or a controlling part of the share capital in three other companies. In connection with this scheme an issue of 3,000,000*l.* 7 per cent. debenture stock of the Workman Company was made.

Of the appellants in the second appeal (whom I shall call the second appellants) the appellants, Sir Edward Mackay Edgar and Robert Workman, were directors of the Northumberland Company, the appellant, Robert Workman, being the chairman of the board of directors.

The others of the second appellants and the appellant, Sir E. M. Edgar, carried on business as merchant bankers under the style of Sperling & Co.

As a result of the scheme which I have mentioned the control of the Workman Company passed into the hands of the Northumberland Company, and on February 10, 1920, the appellants, R. A. Workman and Sir E. M. Edgar, and the defendant, Sir John Esplen, who was also a director of the Northumberland Company, became directors of the Workman

Company. The first appellants and the deceased defendant, Frank Workman, continued directors of the Workman Company until some months later, apparently for the purpose of superintending the carrying out of certain shipbuilding contracts previously entered into by that company.

On February 11, 1920, the prospectus upon which the respondent acted appeared. It purported to be an offer by Messrs. Sperling & Co. to sell the whole issue of 3,000,000*l.* 7 per cent. debenture stock of the Workman Company at 95 per cent. The prospectus stated that this debenture stock had been acquired by Messrs. Sperling & Co. at the price at which it was offered for sale subject to the payment of a commission of 3 per cent. The stock was expressed to carry interest at 7 per cent. and to be redeemable at 105 per cent. on or before February 1, 1940, and to be guaranteed both as to principal and interest and premium by the Northumberland Company.

The respondent applied to Messrs. Sperling & Co. for stock to the nominal amount of 200*l.* and paid 190*l.* therefor.

It is unnecessary to set out the respects in which the prospectus is alleged to have contained untrue statements. It suffices to say that the evidence adduced by the respondent affords prima facie ground for regarding the prospectus as in several material respects untrue and misleading.

Shortly after the issue of the debenture stock the Northumberland Company made itself master of all the liquid resources of the Workman Company including investments of the value of 1,600,000*l.* and the proceeds of the sale or issue of the debenture stock, and applied these resources directly or indirectly in paying for the shares of the Workman Company and the shares of the other companies which it had acquired and for other purposes of the Northumberland Company.

These financial methods, combined with the industrial depression which ensued, eventually reduced both the Workman Company and the Northumberland Company to a condition in which the debenture stockholders of the Workman Company could find little comfort. The value of the debenture stock fell to a low figure.

The respondent, who retained his debenture stock, launched this action on January 20, 1926.

The action came for trial on September 27, 1927, before Brown J. sitting with a special jury, and was before the Court for twenty days.

On November 21, 1927, at the close of the respondent's case the learned judge upon the application of the first appellants and of the defendant Sir John Esplen held that there was no case to go to the jury against the applicants in respect of the first cause of action (namely, the case of fraudulent misrepresentation in the prospectus) on the ground that there was no evidence connecting the applicants with the making of the statements alleged to be false. The learned judge accordingly dismissed the action with costs as against the applicants, and this conclusion was embodied in a certificate of the Registrar dated November 24, 1927.

On November 24, 1927, the learned judge further ruled (1.) that there was no evidence to go to the jury against any of the defendants on the third cause of action—namely, the charge of conspiracy, and (2.) that on the second cause of action the only evidence pointed to Messrs. Sperling & Co. being the purchasers of the debenture stock from the Workman Company, and that upon the true construction of s. 84 of the Companies (Consolidation) Act, 1908, a prospectus by a purchaser offering the debenture stock for sale was not within the section. The learned judge therefore also withdrew the second cause of action from the jury.

The result of the learned judge's conclusions was that the action could only proceed against the second appellants upon the first cause of action—namely, fraudulent misrepresentation.

The action, however, did not proceed by reason of the events which I will next mention. On November 28, 1927, the second appellants applied to amend their defence by lodging in Court with a denial of liability the sum of 130*l.* in satisfaction of the first cause of action. Their application was allowed upon the terms of their paying the respondent his general costs of action, including the costs of the issues arising out of the first cause of action. Thereupon the respondent intimated his intention to accept the sum lodged in satisfaction of the matters in respect of which it was lodged.

By the formal judgment, which was dated November 28, 1927, the second appellants were ordered to pay the costs the payment of which had been made a condition of their leave to amend, the 130*l.* was ordered to be paid out to the respondent, the jury was discharged, and judgment was given for the second appellants on the second and third causes of action with the costs of action on the issues arising thereon and certain directions for the set-off of costs were given.

On the same November 28, 1927, the respondent obtained leave to appeal against the decision of Brown J. given on November 21, 1927, whereby the action so far as it related to fraudulent misrepresentation had been dismissed as against the first appellants and the defendant Sir John Esplen.

On January 10, 1928, the respondent gave notice of appeal against the decisions of Brown J. of November 21 and 24, 1927, in favour of the appellants.

The notice of appeal in effect asked to have the decisions set aside upon the grounds (1.) that there was evidence to go to the jury against the first appellants and Sir John Esplen upon the first cause of action, (2.) that the learned judge misdirected himself in holding that Messrs. Sperling & Co. were purchasers of the stock, (3.) that the learned judge misdirected himself in law in holding that s. 84 of the Companies (Consolidation) Act, 1908, did not apply to the prospectus, and (4.) that there was evidence to go to the jury against all the defendants on the third cause of action. The notice of appeal further asked for the following relief (1.) that the decision of November 21, 1927, in favour of the first appellants and the defendant Sir John Esplen in respect of fraudulent misrepresentation be set aside and an order be made against the first appellants and the defendant Sir John Esplen for payment of the respondent's costs of appeal in respect of the matters aforesaid and of his costs of the trial in respect thereof rendered abortive by reason of the application which led to the decision of November 21, 1927, or alternatively an order be made against the second appellants and the Northumberland Company for payment to the respondent of any costs he might be liable to pay to the first appellants and the defendant Sir John Esplen.

(2.) That as regards the second cause of action the judgment of November 28, 1927, be set aside with costs of the appeal and of the action in respect thereof and that a new trial be ordered; and

(3.) That as regards the third cause of action also the judgment of November 28, 1927, be set aside with costs of the appeal and of the action in respect thereof and that a new trial be ordered.

The appeal came on for hearing on February 28, 1928, and was heard for sixteen days. During the hearing of the appeal proceedings were by consent discontinued against the defendant Sir John Esplen.

In the result the Court of Appeal came to an unanimous conclusion upon all points except one.

The points upon which they were unanimous were: (1.) that the acceptance by the respondent of the money paid into Court discharged all the defendants in respect of the first cause of action; (2.) that the learned trial judge was wrong in withdrawing from the jury each of the following matters: (*a*) the case against the first appellants upon the first cause of action; (*b*) the question whether Messrs. Sperling & Co. were in fact purchasers of the debenture stock from the Workman Company, and (*c*) the case against all the defendants on the third cause of action; (3.) that the learned judge was right in his construction of s. 84 of the Companies (Consolidation) Act, 1908; and (4.) that the measure of damages upon the third cause of action was wider than that upon the first cause of action, and that a new trial should be allowed upon the third cause of action.

The Lord Chief Justice and Best L.J. further held that the measure of damages on the second cause of action was wider than that on the first cause of action and that a new trial should also be allowed upon this head. On the other hand, Andrews L.J. was of opinion that the measure of damages was the same in these two causes of action and that no new trial in this respect should be allowed.

The formal order of the Court of Appeal was dated May 14, 1928, and as ultimately amended on June 26, 1928, set aside the decisions of the trial judge complained of. It further declared the respondent entitled to his costs of action referable to all three causes of action up to and including November 24, 1927, as against the first and second appellants, and from November 24, 1927, up to and including November 28, 1927, as against the second appellants, and ordered a new trial of the second cause of action against the first appellants and the appellants Sir E. M. Edgar and R. A. Workman and a new trial on the third cause of action against all the appellants. The appellants were ordered to pay the costs of the appeal.

The conclusions of the Court of Appeal are called in question before your Lordships' House by all the appellants.

The first question is whether the view of the trial judge or that of the Court of Appeal upon the evidence adduced at the trial in support of the respondent's case is the right one. A full and critical examination of that evidence has taken place before your Lordships. Having regard to the fact that actions by others who applied for debenture stock upon the prospectus of February 11, 1920, are still pending it is well to abstain from any further comment upon the evidence. Suffice it to say that I concur in the observations upon the evidence of the noble and learned Viscount on the Woolsack and I am satisfied that the evidence if uncontradicted or unexplained is such that upon it a jury might without perversity have found a verdict unfavourable to the appellants in respect of each of the alleged causes of action. In my judgment therefore the Court of Appeal in this respect came to a correct conclusion. It is admitted by the respondent that his acceptance of the money lodged in Court debars him from proceeding against the first appellants on the first cause of action, but the question remains whether having regard to that acceptance any new or further trial should have been ordered by the Court of Appeal in

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respect of the second cause of action or of the third cause of action.

The answer to this question is in my opinion found when the form of the statement of claim is examined.

As I read the statement of claim the respondent alleges only one matter of damage though he bases himself upon three alternative legal grounds. Having accepted the 130*l.* in satisfaction of his damage upon the footing of one of the three alternatives he ought not in my opinion to be allowed to proceed upon the other alternatives as though he had founded upon them separate claims for damages.

In this view of the matter it is unnecessary for your Lordships to consider the nature of the action for conspiracy, a topic much debated in the course of the case. It will however be proper notwithstanding the conclusion already indicated to pass an opinion upon s. 84 of the Companies (Consolidation) Act, 1908, which gave rise in one respect to a difference of judicial opinion in the Court of Appeal of Northern Ireland.

I agree with the learned trial judge and the Court of Appeal as to the general scope of the section, but on the question of the measure of damages, I prefer the view of Andrews L.J. to that of the majority of the Court of Appeal.

In my opinion the effect of the section is to create a statutory tort having within the ambit prescribed by the section the same characteristics and consequence as the corresponding common law tort based on misrepresentation except that the complainant is relieved of the necessity of alleging and proving fraud. I agree with Andrews L.J. that it would be strange if the measure of compensation for what morally speaking is the less serious offence should be held to be greater than the measure of damages for the graver offence.

Further I think that the order of the Court of Appeal was wrong in the matter of costs. I cannot hold the view that it was proper to make an order for the payment of costs against parties in respect of issues which as against them had never been tried.

In the result therefore I think that the order of the Court of Appeal should be varied in the manner indicated by the motion made by the noble and learned Viscount upon the Woolsack and that there should be no costs of the appeal to your Lordships' House.

Lord Thankerton. My Lords, I concur in the judgment of the noble and learned Viscount upon the Woolsack.

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Order of the Court of Appeal in Northern Ireland varied by discharging so much of the order as directed a new trial and payment of costs, and subject to such variation affirmed. The appellants together with the appellants in the appeal of Stracey and Others *v.* Urquhart *to pay to the respondent half his taxed costs of the appeal to the Court of Appeal in Northern Ireland; and the respondent to pay to the appellants in this appeal the costs of the action referable to the issue of deceit and to recover such costs over against the other defendants; and on the claim for conspiracy and under s.* 84 *of the Companies (Consolidation) Act,* 1908, *judgment to be entered for the defendants without costs. Each party to bear their own costs of the appeal to this House.*

Lords' Journals, July 24, 1929.

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Order of the Court of Appeal in Northern Ireland varied by discharging so much of the order as directed a new trial and payment of costs and subject to such variation affirmed. The appellants together with the appellants in the appeal of Clark and Others *v.* Urquhart *to pay to the respondent half his taxed costs of the appeal to the Court of Appeal in Northern Ireland; and the respondent to pay*

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to the appellants in the appeal of Clark and Others *v.* Urquhart *the costs of the action referable to the issue of deceit and to recover such costs over against the other defendants; and on the claim of conspiracy and under s.* 84 *of the Companies* (*Consolidation*) *Act,* 1908, *judgment to be entered for the defendants without costs. Each party to bear their own costs of the appeal to this House.*

Lords' Journals, July 24, 1929.

Solicitors for the appellants in the first appeal: *Blyth, Dutton, Hartley & Blyth, for Robert Wallace, Belfast, and Nicholson, Graham & Jones, for McLean & Son, Belfast.*

Solicitors for the appellants in the second appeal: *Deacon & Co.*

Solicitors for the respondent: *Carter & Bell, for T. Erskine Alexander, Belfast.*

[PRIVY COUNCIL.]

EUGÈNE BERTHIAUME . . . . APPELLANT;

AND

DAME DASTOUS . . . . RESPONDENT.

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ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada (Quebec)—Marriage—Marriage solemnized out of Quebec—Marriage null where solemnized—International Law—Construction of Civil Code—Putative Wife acting in good Faith—Right to Alimony—Civil Code, arts. 156, 164.

A marriage between persons domiciled in the Province of Quebec, solemnized in France according to the rites of the Roman Catholic Church, but without a civil ceremony, being a nullity under French law is a nullity also in Quebec. The Civil Code does not vary the well established rule of international law in the matter, nor does art. 156 give the Court discretion to declare the marriage valid. Under art. 164 however, a marriage though null produces in favour of a putative wife who has acted in good faith civil effects which include a right to alimony.

Judgment of the Court of King's Bench Q. R. 45 K. B. 391 reversed; case remitted to deal with the civil effects of a marriage held null but allowed to be putative, subject to the above decision as to the right to alimony.

APPEAL (No. 127 of 1928) from a judgment of the Court of King's Bench for Quebec (October 30, 1928) affirming a judgment of the Superior Court, District of Montreal (May 30, 1928).

The respondent brought an action against the appellant in the Superior Court claiming that a marriage between herself and the appellant solemnized in Paris be declared valid, that she should be granted an order for separation on the ground of the appellant's misconduct, that the community of property be dissolved, and that alimony should be granted to her; alternatively she prayed that the marriage should be held to have been contracted by her in good faith, and that it produced civil effects, as provided by arts. 163, 164 of the Civil Code of Quebec.

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* *Present:* VISCOUNT DUNEDIN, LORD DARLING, LORD WARRINGTON OF CLYFFE, MR. JUSTICE DUFF, and SIR LANCELOT SANDERSON.

The facts, and the material provisions of the Civil Code of Quebec, appear from the judgment of the Judicial Committee.

The trial judge (Loranger J.) held that although the marriage was void according to the law of France he had discretion under art. 156 of the Civil Code to declare it valid, and that in the circumstances of the case he should exercise that discretionary power. He therefore granted the relief prayed, including an allowance for alimony.

An appeal to the Court of King's Bench (Appeal Side) was dismissed by Greenshields, Guerin, Letourneau, and Hall JJ.; Bernier J. dissenting. The appeal is reported at Q. R. 45 K. B. 391.

1929. June 24. *Lafleur K.C.*, *Hon. Geoffrey Lawrence K.C.* and *Faribault K.C.* for the appellant. The marriage being a nullity under the law of France was a nullity in Quebec according to well settled principles of international law. Art. 135 of the Civil Code, which provides that a marriage valid where it is solemnized is valid in Quebec, is exclusive as to the circumstances in which a marriage out of Quebec is to be valid there. Art. 156 does not by its concluding words empower a Court to treat as valid a marriage which is a nullity according to international law. [They were stopped upon that point.] The Court had no power under art. 164 to decree alimony to the respondent. She was not in good faith within the meaning of that article; she could not have supposed that what took place at the consulate satisfied the requirements of the French law. But in any case the civil effects which under art. 164 may be produced by a putative marriage cease as soon as the marriage is declared to be void, consequently alimony cannot be decreed under it in this case. That view is supported by the following: Marcadé, vol. i., no. 696; Planiol et Ripert, vol. ii., no. 330; Sirey, art. 201, no. 32; Baudry, vol. ii., p. 476; Huc, vol. ii., no. 164. A different view is taken by Laurent, vol. ii., nos. 507, 510, 511. Arts. 175 and 211 under which alimony can be allowed by their terms apply only to an actual wife.

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Geoffrion K.C. and *Pritt K.C.* for the respondent. Under the Civil Code the law in Quebec as to marriages solemnized out of the Province differs from the rule of international law. Art. 135 is permissive or enabling; there is no provision that a marriage outside Quebec, not in accordance with the local formalities, is void. The effect of a marriage of that kind has to be ascertained from other articles. On any other construction art. 135 is unnecessary. A marriage not solemnized by a competent officer (art. 128), whether solemnized in Quebec or out of it, is dealt with by art. 156, and under its final words the Court has a discretion to declare the marriage valid. Under the old French law when a marriage was declared void for want of formality there was power to order the celebration of a valid marriage. The final words of art. 156 were added to the article as it stood in the Code Napoléon in order to provide machinery for the exercise of a corresponding relief: see Pothier, Traité du Contrat de Mariage, nos. 361, 365, 451. The circumstances of this case justified the exercise of that discretionary power. If however the Court had not that power under art. 156, nevertheless under art. 164 the marriage produced civil effects in favour of the respondent, as she acted throughout in good faith. Those civil effects included the right to maintenance under art. 173, that right not being inconsistent with the marriage being merely putative. That view is supported by a French decision mentioned in Planiol, Droit Civil, 4th ed., vol. iii., p. 235.

Lafleur K.C. replied.

July 16. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. In 1913 the respondent, a French Canadian of the Roman Catholic faith, being then a girl seventeen years of age who had just graduated from a convent in a small town in Montreal, went on a trip to Europe with her father. She there met the appellant, a member of a Quebec family and also of the Roman Catholic faith, who had been living in Paris for several years. He proposed marriage

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to her, and she accepted. The appellant asked the respondent to make the necessary arrangements, and she called on the curé of the parish where her fiancé had been residing and where she was then temporarily residing. The curé informed her that there were certain civil formalities to be gone through and that he would celebrate the marriage. She asked her fiancé to attend to the civil formalities, and he took her to the British consulate where certain papers were signed and a certificate issued which was given to her fiancé. After that the parties proceeded to the church, the certificate was handed to the curé, who then proceeded to celebrate the marriage according to the form of the Roman Catholic Church. The parties lived together as husband and wife until the year 1926, when on returning from an absence from home the respondent discovered that the appellant had been guilty of infidelity and had introduced a mistress into their home. The respondent then applied to the Court in Paris for a divorce. That Court before proceeding further demanded the exhibition of a civil certificate of marriage. This the respondent was unable to produce. She then discovered that the certificate which her fiancé had procured at the British consulate was only a notice of intended marriage, and that the officiating curé had carelessly omitted to notice that it was not a certificate of marriage. As a matter of fact he had exposed himself to severe penalty by celebrating the religious ceremony without the production of a certificate. As no certificate of marriage could be produced—none such ever having been in existence—the Court declined to proceed with the case for divorce. The respondent then raised another action in the French courts, craving a judgment "pour faire statuer le mariage," and craving alternatively that if the marriage was declared void it should be held that she had contracted it in good faith and was entitled to a declaration of civil effects in her favour. The appellant appeared and denied the jurisdiction, he having still retained his Canadian domicil. This plea was sustained and the action dismissed. The respondent then raised the present action in the Superior Court of the Montreal district. The action sought a declaration

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of marriage, decree of separation, a dissolution of the communauté des biens—the marriage having been without a marriage contract, communauté des biens would ensue—and a judgment for alimony. Damages were also claimed, but that claim was departed from. Alternatively a declaration was sought that as the respondent had been in good faith, the marriage was a putative marriage and in terms of art. 164 of the Civil Code produced civil effects. The case depended before Loranger J. who held the marriage valid, pronounced a decree of separation, dissolved the community of goods and granted a decree against the appellant for an alimentary allowance of $1500 a month. On appeal the Court of King's Bench by a majority upheld the judgment. Bernier J. dissented, and held that the marriage was null and that a null marriage could not be a putative marriage. The present appeal is from that judgment.

Their Lordships are unable to agree with the judgment under appeal. If there is one question better settled than any other in international law, it is that as regards marriage —putting aside the question of capacity—locus regit actum. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicil of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicil would be considered a good marriage. These propositions are too well fixed to need much quotation. They were laid down long ago in England in the well known case of *Dalrymple* v. *Dalrymple* (1) and in *Scrimshire* v. *Scrimshire* (2), approved by Lord Stowell in *Ruding* v. *Smith*. (3) A question precisely the same as the present had been decided in Scotland in the case of *Johnstone* v. *Godet* (4), mentioned by Lord Fraser in his work on Husband and

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(1) (1811) 2 Hag. Con. 54.
(2) (1752) 2 Hag. Con. 395.
(3) (1821) 2 Hag. Con. 371, 393.
(4) (1813) Ferg. Con. L. R. 8.

Wife, vol. ii., p. 1310, where the parties had undergone a ceremony of marriage in Martinique, where the Code Napoléon prevailed. This marriage, if it had taken place in Scotland, would have been good. But there was no civil ceremony and the marriage was bad under the Code; and it was held no marriage in Scotland.

Of course, these results may be altered by positive, i.e., statute, law. A good illustration may be given in the legislation which was passed in order to cure what was thought to be abuse of Gretna Green marriages. Marriage in Scotland can be constituted by mere words of consent de praesenti in the presence of witnesses, and English couples used to cross the border by Gretna to be married by interchange of consent in the presence of the blacksmith and his assistant. A statute was passed declaring a marriage constituted by consent de praesenti null where the parties had not previously resided in Scotland for at least three weeks.

Now in face of the facts set forth in the narrative above given, and these facts were found by all the judges of the Courts below and are amply borne out by the evidence, it is clear that under international law there was no marriage in this case. The law of France is peremptory. There must be a civil ceremony of marriage, and if that has not taken place any religious ceremony is an idle performance so far as the law is concerned. Learned counsel for the respondent could not controvert this statement of international law, and therefore he sought to show that the validity of the marriage was established upon positive law contained in the Civil Code of Quebec.

The articles he relied on were the following:—

"7. Acts and deeds made and passed out of Lower Canada, are valid, if made according to the forms required by the law of the country where they were passed or made.

"51. On proof that in any parish or religious community no registers have been kept, or that they are lost, the births, marriages and deaths may be proved either by family registers and papers, or other writings, or by witnesses.

"128. Marriage must be solemnised openly, by a competent officer recognised by law.

"129. All priests, rectors, ministers and other officers authorised by law to keep registers of acts of civil status, are competent to solemnise marriage. . . .

"135. A marriage solemnised out of Lower Canada between two persons, either or both of whom are subject to its laws, is valid, if solemnised according to the formalities of the place where it is performed, provided that the parties did not go there with the intention of evading the law.

"156. Every marriage which has not been contracted openly, nor solemnised before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide according to the circumstances.

"159. No one can claim the title of husband or wife and the civil effects of marriage, unless he produces a certificate of the marriage, as inscribed in the registers of civil status, except in the cases provided for by article 51.

"160. Possession of the status does not dispense those who pretend to be husband and wife, from producing the certificate of their marriage.

"161. When the parties are in possession of the status and the certificate of their marriage is produced, they cannot demand the nullity of such act."

Articles 128, 129 and 135 appear in chapter 2 of the Code, the heading of which is "Of the formalities relating to the solemnisation of marriage." It is out of the question to suppose that the Legislature is dealing with anything except the formalities to be observed in the Province of Quebec. It would be idle to provide formalities to be observed in all the parts of the world. This is clear enough from the heading, but it is made more clear by the phraseology implied in the articles. Take for instance art. 129. Who can "keep registers of acts of civil status" except the persons that can be so authorized in the Province of Quebec? The term is inapplicable to any one elsewhere. Art. 130 with its reference to the early articles as to the publication of banns

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is also utterly inappropriate to a marriage except in the Province of Quebec.

The article however on which the respondent laid greater stress and on which the judgment of the Court below mainly proceeded is art. 156. This is in a fasciculus of articles headed "Of actions for annulling marriage." It is not in such a division that one would expect the power of dealing with the constitution of marriage said to be contracted abroad. The article runs: "Every marriage which has not been contracted openly, nor solemnized before a competent officer, may be contested by the parties themselves and by all those who have an existing and actual interest, saving the right of the court to decide according to the circumstances."

The first sentence gives the right of challenge and doubtless every foreign marriage could come within its words, for no foreign marriage could have been solemnized by a competent officer, which obviously refers to such a person in Quebec. The words which are appealed to are the last words, and it is supposed to add to their weight the fact that in the Code Napoléon, on which the Quebec Code is obviously modelled, the first sentence appears, but the words at the end do not. Let it be observed what the argument comes to. International law being as set forth, it is to be held that this saving clause gives a power to the Court to override that law as upheld in every other country of the civilized world, but it also if so interpreted would do more. It would enable the Court to declare marriage to arise from a proceeding which under the law of no country was ever supposed to be marriage. Naturally the good sense of the Quebec judges would prevent them from doing any such thing; but when construction is in question the results of construction must be looked at· The truth is that their Lordships can only look on this as a most preposterous suggestion, and they agree with the view that Bernier J. took on this matter.

The case of a foreign marriage is dealt with in terms by art. 135, and that expresses the doctrine of international law. As this is in the section dealing with the constitution of marriage, it would have been quite out of place to express the converse of the doctrine, so that the brocard "expressio unius est exclusio alterius" cannot apply. Their Lordships have therefore no hesitation in declaring that the so-called marriage in this case was ab initio null.

There remains however the question arising on arts. 163 and 164. They are: "163. A marriage although declared null, produces civil effects, as well with regard to the husband and wife as with regard to the children, if contracted in good faith. 164. If good faith exist on the part of one of the parties only, the marriage produces civil effects in favour of such party alone and in favour of the children issue of the marriage."

Now as regards good faith, all the judges held, and their Lordships agree with them, that there was perfect good faith on the respondent's part. She was a very young girl, quite ignorant of law, and from her antecedents and religion probably quite incapable of considering marriage as anything but a religious ceremony and ordinance. It is true that she was told that some civil formalities were necessary, but she had no exact knowledge of what that meant, and she would be amply satisfied with the assurance that they had been gone through at the British Consulate, all the more that the certificate produced was accepted as good by the officiating priest. Art. 163 is only necessary for grammatical reasons; the real article touching this case is art. 164. It applies to this case in terms and deals with civil rights. Holding the views they did as to there being a real marriage, the majority of the learned judges found it unnecessary to deal with art. 164, a case of what is generally known as putative marriage. The doctrine of putative marriage was well known to the canon law, and has been adopted by many systems founded on the canon law. In England the canon law on this subject has been abandoned. In Scotland it is in viridi observantia. Scotland so far deserted canon law at the reformation as to make divorce a vinculo competent, but otherwise its matrimonial system is founded on the canon law. Bernier J., who disagreed with the other learned judges as to the question of marriage, dismisses this point with the curt observation

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that a putative marriage cannot be a marriage which is null. This is indeed an extraordinary proposition. It is just when a marriage is declared null that the doctrine of putative marriage becomes necessary. Cases of the insistence of the so-called wife on her rights are more rare, but cases of the assertion of legitimacy of children born of a marriage subsequently declared null are numerous in every system which accepts the doctrine of putative marriage.

Two arguments were then put forward by the learned counsel for the appellant directed as to the lady's right to alimony. First, he said that the civil rights referred to were only those which existed up to the date when the marriage was declared null. The simple answer is that the word is "produces," not "has produced," and the absurdity of such a doctrine when applied to the legitimacy of children, who in the article are linked with the wife, is manifest. Secondly, he said that obviously all the civil rights of a wife which flow from marriage could not continue to exist, e.g., the right to cohabit, and therefore the right of alimony could not exist. It is, however, impossible to suggest on this view that any civil right still exists. It is quite true, as said, that all civil rights appendant to real marriage are not produced by a putative marriage. But the criterion is obvious; those only subsist which are consistent with a real marriage not existing. Alimony is such a right. The duty of a husband to support his wife is quite apart from his duty to cohabit with her. This is correctly shown in the form of a decree of separation which deals with the mensa as separate from the torus.

Their Lordships are therefore of the opinion that the respondent is entitled to alimony. The argument of learned counsel turned so specially on the question of alimony that scant mention was made as to the communauté de biens. Their Lordships would have felt inclined to hold that inasmuch as nullity of marriage was declared, it was equivalent to saying that no communauté de biens ever really existed; to declare the dissolution of what never existed would be a pleonastic proceeding. But the learned judges of the Court below who decided that the marriage was valid have had no opportunity of saying what are exactly the civil rights of a putative marriage, and since the case was first heard their Lordships have had their attention directed to several cases (1), which seemed to point to a settled practice as to this, which their Lordships in such a matter would not willingly disturb. They are, therefore, of opinion that the case should be remitted to the Superior Court of Quebec to deal with the civil effects of a marriage held null but allowed to be putative, it being distinctly understood that their Lordships are clearly of opinion that the continuance of alimony to the wife is one of the civil effects, the amount of which it will be for the Court of Quebec to determine, the amount decreed for in the judgments recalled being continued in the meantime.

The costs of the appeal will be borne as between solicitor and client by the appellant, who will also fulfil the other articles of the conditions on which special leave to appeal was granted.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the case remitted to the Superior Court accordingly.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Lawrence Jones & Co.*

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(1) See *Levesque* v. *Ouellet* (1902) Q. R. 22 S. C. 181.

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DOMINION BUILDING CORPORATION, LIMITED . . . . APPELLANTS;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Claim against the Crown—Reference by Minister to Exchequer Court—Scope of Minister's Authority—Motion to set aside Reference—Right of Appeal—Exchequer Court Act (*R. S. Can.*, 1906, *c.* 140), *ss.* 38, 82.

The authority, under s. 38 of the Exchequer Court Act of Canada, of a Minister to refer to that Court any claim against the Crown arising in connection with the administration of the department of which he is the head is not restricted to claims which exclusively concern the administration of his department, it may be exercised although other departments are incidentally concerned. Further, a matter which was originally not a departmental but a government matter may be appropriated to a particular department, and so become part of the administration of that department for the purpose of s. 38.

An appeal lies to the Supreme Court of Canada, under s. 82 of the above Act, from the order of the Exchequer Court upon a motion to set aside a reference under s. 38 as invalid, the proceeding being in the nature of a demurrer.

Judgment of the Supreme Court of Canada [1928] S. C. R. 65 reversed as to s. 38 and affirmed as to s. 82.

APPEAL (No. 47 of 1929) by special leave from a judgment of the Supreme Court of Canada (December 16, 1927) reversing a judgment of the Exchequer Court of Canada.

By s. 38, sub-s. 1, of the Exchequer Court Act of Canada, "any claim against the Crown . . . . may be referred to the Court by the head of the department in connection with the administration of which the claim arises." In pursuance of the above provision the acting Minister of Railways and Canals referred to the Exchequer Court a claim by the appellants. The claim was for damages for the repudiation of an alleged contract to sell land in Toronto which was vested in the Crown represented by the Minister; the appellants were assignees of the purchaser. The nature of the alleged contract and the circumstances in which it was entered into appear from the judgment of the Judicial Committee.

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* *Present:* LORD SANKEY L.C., LORD DARLING, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, and LORD THANKERTON.

The respondent moved the Exchequer Court for leave to withdraw the reference, or in the alternative for an order striking out the appellants' statement of claim. The Exchequer Court dismissed the motion.

An appeal to the Supreme Court of Canada was allowed. That Court held (1.) that the appeal lay under s. 82 of the Exchequer Court Act, the proceedings being in the nature of a demurrer; (2.) that the reference was not valid, since s. 38, sub-s. 1, applies only to a claim which exclusively concerns the administration of the department whose head refers it, and the present claim was in relation to a government, not a departmental, undertaking. The appeal is reported at [1928] S. C. R. 65.

1929. July 8, 9. *Macmillan K.C.* and *Ronald Smith* for the appellants.

Cannon (*S.-G. for Canada*), *Geoffrion K.C.*, *Plaxton K.C.* and *Theobald Mathew* for the respondent.

Oct. 15. The judgment of their Lordships was delivered by

LORD THANKERTON. The main question in this appeal from a judgment of the Supreme Court of Canada relates to the validity of a reference made on September 16, 1926, by the acting Minister of Railways and Canals bearing to be made by virtue of s. 38 of the Exchequer Court Act (R. S. Can., 1906, c. 140) in the following terms :—

" In the Matter of Dominion Building Corporation Limited Claimants, and His Majesty the King Respondent.

" Reserving the right to plead and maintain that the said Dominion Building Corporation Limited is not entitled to any compensation, I hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation Limited, for compensation alleged to be due by reason of the allegations therein set forth.

" Dated at Ottawa, this Sixteenth day of September, 1926.

" (Sgd.) H. L. DRAYTON,
" Acting Minister of Railways and Canals."

The claim thus referred was a claim for damages in respect of a repudiation by the Minister of an alleged contract to sell certain freehold lands in Toronto at the price of $1,250,000, and was set forth in a letter dated September 4, 1926, addressed to the Minister of Railways and Canals by the appellant company, as assignees of a contract alleged to have been made by the Minister with one James Forgie in July, 1925.

At the time of the alleged contract the property in question, which consisted of a large parcel of land in an important position in the city of Toronto, stood vested in H.M. the King as represented by the Minister of Railways and Canals under a deed dated August 17, 1923, granted by the Imperial Bank of Montreal.

The contract of sale was alleged to have been constituted by a written offer of purchase by the said James Forgie, dated July 27, 1925, addressed to His Majesty, represented by the Minister of Railways and Canals, which was formally accepted and approved of by an Order of the Governor in Council, upon the report and recommendation of the Minister of Railways and Canals on July 29, 1925. Thereupon Forgie, on August 5, 1925, assigned to the appellant company all his interest in the contract.

The contract provided that the purchaser should erect on the property and adjoining lands a twenty-six storey office building, and that the Crown, represented by the Minister of Railways and Canals, should execute a lease of the ground and three next floors of the building, on specified terms, for the use of the Canadian National Railways.

Though not referred to in the contract, it appears to have been part of the negotiations that a lease of five other floors in the proposed building should be similarly executed for the use of the Department of Customs. Negotiations on this matter appear to have delayed the carrying out of the main contract for some months, but ultimately on February 1, 1926, an Order in Council was passed, on the recommendation of the Minister of Public Works, authorizing the leasing of five other floors for the use of the Department of Customs and Excise.

On February 6, 1926, the appellant company notified the Minister of Railways and Canals of their readiness to complete the purchase. On February 12, 1926, the Minister notified the appellant company that he had decided not to carry out the agreement, and on September 4 the appellant company lodged with the Minister the claim for damages already referred to, which was the subject of the reference here in question, dated September 16, 1926.

On November 24, 1926, the Minister of Justice, who advised that the reference was not binding on the Crown, was authorized by Order in Council to withdraw the reference, and, on the same date, withdrawal of the reference was formally notified to the registrar of the Exchequer Court of Canada.

The validity of that withdrawal was disputed by the appellant company, and on February 3, 1927, the Exchequer Court held the withdrawal to be ineffective. The respondent thereupon moved the Court for leave to withdraw the reference or in the alternative for an order striking out the appellants' statement of claim, but this motion was dismissed by the Exchequer Court on March 2, 1927, whereupon the respondent appealed to the Supreme Court of Canada. An attempt by the appellants to have the appeal quashed for want of jurisdiction was unsuccessful, and on December 16, 1927, the Supreme Court dismissed the motion to quash and allowed the appeal on the ground that the reference was not a valid one. The present appeal is taken by the appellant company against that judgment.

Only two questions were argued before the Board, namely: (1.) Whether the Supreme Court had jurisdiction to entertain the appeal from the judgment of the Exchequer Court, and (2.) whether the reference was authorized by s. 38 of the Exchequer Court Act.

On the first point their Lordships agree with the judgment of the Supreme Court on the grounds stated by them. The second question involves the construction of s. 38 of the Exchequer Court Act, which provides as follows:—

"38. Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the Department in connection with the administration of which the claim arises.

"(2.) If any such claim is so referred no fiat shall be given on any petition of right in respect thereof."

While the Crown does not concede the conclusion of a valid and binding contract of purchase, it was agreed that for the purpose of the present question the validity of the contract may be assumed, as that issue would appropriately be contested in the reference.

The appellant company maintain that the claim arose "in connection with the administration" of the department of Railways and Canals, and they found on the fact: (1.) that the property was vested in the Crown, as represented by the Minister of Railways and Canals; (2.) that it was occupied by the Canadian National Railways, of whose properties the Minister has charge and direction; (3.) that the offer was addressed to the Minister, who still holds the deposit money; (4.) that the approval of the Governor in Council was obtained by the Minister; and (5.) that the repudiation, out of which the claim arises, was made by the Minister.

The respondent relied on the grounds of the decision of the Supreme Court in his favour, which held that s. 38, sub-s. 1, is confined to claims which exclusively concern the administration of the department, whose head exercises the power of reference, and that an examination of the terms of the present claim disclosed: (1.) that the leases to the Canadian National Railways and to the Department of Customs and Excise were essential to the financing of the whole project, that without them the contract had no financial value to the appellants, and that the failure to obtain such leases is the substantial basis of the claim, and (2.) that the negotiation of the contract, and the whole project, was a governmental undertaking as distinguished from a merely departmental transaction, and that the Minister of Railways and Canals, in executing and repudiating the contract, was merely acting as the agent and representative of the Government under a special authority deputed to him.

In their Lordships' opinion the construction of s. 38 adopted by the Supreme Court is too narrow. The allocation of classes or items of Government business may be statutory, or customary, or under a particular allocation.

The Department of Railways and Canals was created by the Department of Railways and Canals Act (R. S. Can., 1906, c. 35), and under s. 7 the Minister has "the management, charge and direction of all Government railways and canals and of all works and property appertaining or incident to such railways and canals, also of the collection of tolls on the public canals and of matters incident thereto, and of the officers and persons employed in that service."

Under the Canadian National Railways Act, 1919, the Canadian National Railway Company was created as an independent corporation, consisting of a board of directors, nominated by the Governor. Under s. 11 the Governor in Council was empowered to entrust to the company "the management and operation of any lines of railway or parts thereof, and any property or works of whatsoever description or interests therein and any powers, rights or privileges over or with respect to any railways, properties or works, or interests therein, which may be from time to time vested in or owned, or occupied by His Majesty, or such part or parts thereof, or rights or interests therein, as may be designated in any Order in Council, upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide." Management by the company was to continue during the pleasure of the Governor in Council.

By Order in Council dated January 20, 1923, the Canadian Government Railways, defined for the purpose of s. 10 of the Act of 1919, to include certain specified railways and "as a general designation all other railways and branch lines, the title to which and to the lands and properties whereon such railways are constructed, is vested in His Majesty," were "entrusted in respect of the management and operation thereof" to the company in terms of the Act.

The effect of s. 11 of the Act was (inter alia) to entrust to the company, in respect of management and operation, "all properties, works, powers, rights and privileges incidental to those designated and commonly used, operated and enjoyed in connection therewith."

In their Lordships' opinion, while the effect of the Act of 1919 was to transfer to the Canadian National Railway Company the management and use of the subjects in question for the purpose of operating the railways, it did not transfer to the company the administration of the ownership rights in the property. That remained with the Minister, though the interest of the company in the use of the property would naturally be kept in view. A Minister normally has to consult other departments or other interests, or even get the approval of the Government, in connection with matters properly appropriated to his administration.

In their Lordships' opinion the negotiations and conclusion of the contract of sale in the present case were properly part of the administration of the Minister of Railways and Canals, and the incidental matters of the leases do not affect that position for the purposes of s. 38 of the Exchequer Court Act. If the contract is assumed to be a binding contract, the Order in Council of July 29, 1925, shows that it was treated as properly matter for his administration, and its repudiation, out of which the claim arises, was equally part of his administration. Further, even if the matter were originally not a departmental but a government one, their Lordships would be of opinion that it was appropriated to the Department of Railways and Canals by the Order in Council, and was thereby made part of the Minister's administration for the purposes of s. 38.

Their Lordships are therefore of opinion that the reference of September 16, 1926, was a valid one, and they will humbly advise His Majesty that the appeal should be sustained, that the judgment of the Supreme Court of Canada should be reversed with costs, and that the judgment of the Exchequer Court of Canada should be restored. The respondents will pay the costs of this appeal.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

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CANADIAN GENERAL ELECTRIC COMPANY, LIMITED . . . . } APPELLANTS ;

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FADA RADIO, LIMITED . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Patent—Anticipation—Previous Knowledge outside Canada—Application in 1920—*Misstatement in Declaration—Patent Act* (*R. S. Can.*, 1906, *c.* 69), *ss.* 7, 29—*Patent* (*Amendment*) *Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 44 ; *Can.*), *s.* 7, *sub-s.* 1.

Whether a specification is an anticipation of a later patent, apart from statutory provisions, depends upon the construction of the specification, verbal evidence as to the intention of the person whose specification it s being inadmissible.

Upon the true construction of s. 7 of the Patent Act of Canada, a Canadian patent is invalid if the patented device was known to any other person, whether in Canada or elsewhere, before the patentee's "invention" thereof. Parol evidence is admissible as to the date of the other person's knowledge, and as to the patentee's "invention," by which word is signified the earliest date at which he has given a description, either in writing or verbally, which gives the means of making that which is patented. In the present case a letter written by the patentee more than seven years before his application was held to be of that character, and its date being earlier than that at which knowledge could be attributed to the other person, the patent was held not to be invalid under the provision of s. 7 mentioned above.

A declaration by an applicant for a patent, in 1920, that the invention has not been patented elsewhere, whereas he himself has patented it in the United States, is not a "material allegation" avoiding the patent under s. 29 of the Patent Act, because s. 7, sub-s. 1, of 11 & 12 Geo. 5, c. 44, amending the Patent Act, makes it immaterial in the case of an application of that date whether the invention has been patented in any other country.

Wright & Corson v. *Brake Service, Ld.* [1926] S. C. R. 434 and *Fada Radio Ld.* v. *Canadian General Electric Co.* [1927] S. C. R. 520 approved.

Judgment of the Supreme Court of Canada [1928] S. C. R. 239 reversed.

APPEAL (No. 74 of 1928) by special leave from a judgment of the Supreme Court of Canada (February 7, 1928) reversing a judgment of the Exchequer Court (April 14, 1927).

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* *Present :* LORD BUCKMASTER, LORD DUNEDIN, and LORD WARRINGTON OF CLYFFE.

The appellants brought an action against the respondents for infringement of a Canadian patent dated February 15, 1921, in relation to wireless telephony, of which they were the assignees. The respondents by their pleadings admitted an infringement; but contended that the patent was invalid for want of subject-matter, and had been anticipated by the specification of a German patent granted in 1919. The respondents relied also upon s. 7 of the Patent Act of Canada, which provides that an invention to be patentable under that Act must be one which "was not known or used by any other person before his" (the applicant's) "invention thereof"; they also relied upon s. 28, alleging that in the declaration under s. 10 made by the applicant at the time of his application he had made a material allegation which was untrue.

The facts and the material Canadian statutory provisions appear from the judgment of the Judicial Committee.

The trial judge rejected all the above defences and granted the plaintiffs an injunction and inquiry as to damages.

Upon appeal to the Supreme Court the decision was reversed. The learned judges were of opinion that the specification of the German patent was an anticipation of the Canadian patent; it was therefore unnecessary to consider the other defences. The appeal is reported at [1928] S. C. R. 239.

1929. June 13, 14, 17, 18, 21. *Hon. Stafford Cripps K.C.*, *R. S. Smart K.C.* and *J. C. Macfarlane* for the appellants.

Herridge K.C. and *Trevor Watson* for the respondents.

With regard to the defences under the Patent Act of Canada reference was made to *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills* (1); *Wright & Corson* v. *Brake Service, Ld.* (2); *Smith* v. *Goldie* (3); *Fada Radio Ld.* v. *Canadian General Electric Co.* (4); upon the principle applicable in considering whether there had been an anticipation, reference was made for the appellants to

(1) [1929] A. C. 269.
(2) [1926] S. C. R. 434.
(3) (1882) 7 Ont. A. R. 628; (1883) 9 Can. S. C. R. 46.
(4) [1927] S. C. R. 520.

British Thomson-Houston Co. v. *Metropolitan-Vickers Electrical Co.* (1).

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Oct. 15. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. The action in which the present appeal arises is one for the infringement of the Canadian Patent No. 208,583, the application for which was made on September 17, 1920. The application was made by the inventor, Ernest Alexanderson. The patent was dated February 15, 1921, and was granted to the present appellants as assignees of Alexanderson.

That the patent was infringed by the respondents is admitted, but they dispute its validity on several grounds, including those hereinafter specifically mentioned.

The trial judge (Maclean J.) in the Exchequer Court of Canada held that none of the grounds of defence was established, and on April 14, 1927, he pronounced a decree whereby it was declared and adjudged that the patent was valid and that it had been infringed by the respondents, and an injunction with ancillary relief, including an inquiry as to damages, was granted.

The respondents appealed to the Supreme Court of Canada, who, on February 7, 1928, made an order allowing the appeal, reversing the judgment of the Exchequer Court, and dismissing the action with costs.

The present appeal is brought by special leave of His Majesty in Council, granted by Order in Council dated July 30, 1928.

Among the grounds of defence raised by the respondents it is necessary to mention the following only—namely: (1.) lack of subject-matter having regard to the state of the art as shown by earlier patent specifications; (2.) lack of utility; (3.) anticipation by a specification of a German patent granted on June 23, 1919, to Schloemilch and Von Bronk on an application made on February 9, 1913. The specification, however, remained unpublished until the grant of the patent; (4.) A defence founded on s. 7 of the Patent Act of 1906, which provides that the invention claimed shall be one which, amongst other things, "was not known or used by any other person before the claimant's invention thereof." A further defence was raised founded on the fact that Alexanderson's declaration in support of his application stated, contrary to the fact that he had not applied for or obtained a patent for the invention in a foreign country.

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(1) (1927) 45 R. P. C. 1, 24.

It will be convenient to deal with these defences in order, except that No. 2 (want of utility) may be disposed of at once, inasmuch as it was not seriously pressed before the Board.

The patent relates to wireless telegraphy, or, rather, to wireless telephony, and in particular to the selection in a receiving apparatus of oscillations of a given wave length from mixed oscillations. This quality of a receiving apparatus is conveniently referred to as "selectivity." Speaking generally, the object of the inventor was to increase the selectivity of the apparatus and at the same time to avoid loss of strength in the selected oscillations.

The chief elements in a radio receiving apparatus, their functions and operation, are so fully described by Maclean J. in his judgment (record, pp. 390–391), that it is unnecessary to repeat them. It is sufficient to say that at a receiving station it is necessary to eliminate from the infinite number of waves reaching the antennæ or aerial all except those of the desired wave length, and that this is achieved by the use of a tuned circuit containing a condenser. The condenser contains two sets of plates, one of which may be made movable or variable with respect to the other, thus varying the capacity of the condenser and adjusting the resonant frequency so as to correspond to the frequency of the desired wave. A variable condenser is conventionally distinguished in drawings of an apparatus by an arrow drawn through the lines representing the condenser. Another conventional sign is an arrowhead pointing to the secondary of the induction coil. This indicates that the number of turns of the coil may be changed, thus varying the inductance or the voltage of the induction circuit, and as a consequence the resonant frequency thereof.

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It will be convenient, in the first instance, to deal with the two questions of subject-matter and novelty or anticipation as they stand under the general law of patents without reference to the particular provisions of the Canadan Patent Act, and then to consider how far, if at all, that Act alters the position.

First, as to subject-matter. The question here is one of fact, whether, having regard to the conditions of the art, there is sufficient invention in that which the patentee claims to justify the granting of a patent.

The law on this subject is, in their Lordships' opinion, accurately summarized by Maclean J. in his judgment. His statement is as follows: "There must be a substantial exercise of the inventive power or inventive genius, though it may in cases be very slight. Slight alterations or improvements may produce important results, and may disclose great ingenuity. Sometimes it is a combination that is the invention; if the invention requires independent thought, ingenuity and skill, producing in a distinctive form a more efficient result, converting a comparatively defective apparatus into a useful and efficient one, rejecting what is bad and useless in former attempts and retaining what is useful, and uniting them all into an apparatus which, taken as a whole, is novel, there is subject-matter. A new combination of well known devices, and the application thereof to a new and useful purpose, may require invention to produce it, and may be good subject-matter for a patent."

It is now necessary as shortly as may be to consider in what manner Alexanderson describes his alleged invention and what it is that he claims.

His general description is as follows: "In accordance with the present invention, selective tuning is secured by the use of a plurality of resonant circuits arranged in cascade in such a manner that the selectivity of the system increases in geometric ratio with the number of circuits employed. The selective circuits are respectively interlinked by a relay controlling a separate source of energy to initiate oscillations corresponding to potential oscillations impressed upon the relay. As each tuned circuit is more or less opaque to disturbing

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oscillations differing in frequency from the oscillations to be selected, a certain percentage of the disturbances is eliminated in each circuit of the series, so that the purity of the incoming train of oscillations progressively increases as it is successively relayed. The relay preferably used for this purpose is an electron discharge tube having an incandescent cathode, an anode and a grid."

It is unnecessary to explain the drawings at length. It is sufficient for the present purpose to say that in each case the condenser on the input circuit—that is to say, the circuit connected with the cathode of the electron discharge tube—is indicated as being a variable condenser by the use of the conventional sign of an arrow, and the circuit is thus shown to be a tuned circuit capable of adjustment according to the particular wave length which it is desired to select. The drawings and the detailed description referring to them deal only with the employment of three tuned circuits, but the patentee points out that he does not limit himself to three, but that other tuned circuits may be added and the disturbing impulses suppressed in the same degree—namely, in geometric ratio with the number of circuits employed.

Claim 3 (the only claims to which, in their Lordships' opinion, it is necessary to refer) is as follows: "A tuned circuit receiving system for detecting sustained oscillations of a given frequency comprising a plurality of circuits resonant to the frequency of the oscillations to be detected and arranged in cascade, relay devices joining each of said circuits to another comprising an evacuated envelope, an electron-emitting cathode, a co-operating anode, and a grid, said devices being connected to one of said circuits at the cathode and grid and to another circuit at the cathode and anode and a local source of energy in the second circuit."

The question as to subject-matter was not dealt with by the Supreme Court, because, having decided, as they did, against the appellants on other grounds, it was unnecessary to consider whether the plan proposed by Alexanderson disclosed such a degree of invention as would justify the granting of a patent.

There is one circumstance which on this point cannot be neglected, though it is not of cardinal importance—namely, the fact, stated by the appellants and not denied, that Alexanderson's system when published was generally accepted and adopted in the art.

It is true that the fact that increased selectivity was apt to result in a diminution of signal strength had been realized by others, and certain devices had been suggested for overcoming it, e.g., the employment of a relay in a mechanical or acoustic form by Lorenz. For this purpose Alexanderson suggests the use of the vacuum tube for coupling the several circuits together at each relay. In their Lordships' opinion, following that of Maclean J., and assuming for this purpose that Alexanderson's suggestion had not been anticipated, the assembling by Alexanderson in one device of the instrumentalities which furnished means for providing selectivity, progressively improving from circuit to circuit, and at the same time preserving the signal strength, displayed sufficient invention to support his patent. It is true that the vacuum tube which in Alexanderson's invention performs the function of keeping up the signal strength, was not itself new, but the particular use of it for the purpose described in combination with the other elements of the system, and producing the advantageous result, is, in their Lordships' opinion, a sufficient element of novelty to support the patent. It may be only a small step, but it is a step forward, and that is all that is necessary so far as subject-matter is concerned.

But then there arises the much more serious question of anticipation. The answer to this question ultimately involves a consideration of the special provisions of the Canadian Act, but for the present their Lordships propose to deal with the matter without reference to those provisions.

The law on this subject is, in their Lordships' opinion, accurately stated by Maclean J. He says : " Any information as to the alleged invention given by any prior publication must be for the purpose of practical utility, equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defences of anticipation. Where the question is solely one of prior publication, it is not enough to prove that an apparatus described in an earlier specification could have been used to produce this or that result. It must also be shown that the specifications contain clear and unmistakable directions so to use it. It must be shown that the public have been so presented with the invention that it is out of the power of any subsequent person to claim the invention as his own."

The only prior publication which it is necessary to consider is the specification of Schloemilch and Von Bronk for their German Patent No. 299,300, which was dated February 9, 1913, but was not published until the issue of the patent on June 23, 1919, prior, therefore, to the specification of Alexanderson, which was filed with his application on September 17, 1920. Does then the specification of Schloemilch and Von Bronk describe the invention claimed by Alexanderson ?

It is well settled that this is a question of construction and that parol evidence is only admissible for the purpose of explaining words or symbols of art and other such-like technical matters, and, of course, of informing the Court of relevant surrounding circumstances. The learned judge who delivered the leading judgment on this point in the Supreme Court rightly, in their Lordships' opinion, considered that the question turned on whether Schloemilch and Von Bronk intended the input circuit—namely, the circuit between the grid and the filament in the vacuum tube, to be tuned. Unfortunately, however, in their Lordships' view, he rested his conclusion, not on the true construction of the document as alone revealing the intention, but on the intention of the authors of it, derived partly from conversations between them and what they actually did, and partly from a blue print drawing not reproduced in the specification. In their Lordships' opinion, neither the parol evidence nor the blue print was properly admissible for the purpose for which they were used. As to the blue print, moreover, it should not have been relied upon for any purpose. Except that it came from a file in the possession of the German Company to which Schloemilch and Von Bronk belonged, no evidence was given as to the person who prepared it, nor any other evidence which would make it admissible. Except that it bore the date "February 6, 1913," which might have been put upon it at any time, there was no sufficient evidence as to when it was actually made.

As to the specification itself, it is fairly clear from it that the main object of the invention was amplification and not selectivity. The only reference to a tuned circuit is in the description of the detector circuit, where the writers state that "it may be preferable to provide an intermediary circuit tuned to the oscillations," and this intermediary circuit is on the drawings duly furnished with a variable condenser identified as such by the conventional arrow. In Fig. 2 other condensers are shown, one on the input and one on the output circuit, but neither of these is represented as variable. The reference to tuning in regard to the intermediary circuit above referred to and the absence of any such reference in the other cases is, in their Lordships' opinion, most significant. Some reliance was also placed by the respondents upon an arrow-head shown on the drawings in connection with the secondary of the transformers, but their Lordships agree as to this with the view of Maclean J. that this indicated a voltage tap rather than a tuning device, especially as the circuit on which it appears had on it the variable condenser above referred to, and both would not be required for tuning purposes. Treating then the question of anticipation as one to be solved only by ascertaining the true construction of the document containing the alleged prior publication, their Lordships have come to the conclusion that the respondents have failed to make out their case, and that the attack on the appellants' patent on this ground fails.

But so far their Lordships have been considering the matter without reference to the special provisions of the Canadian statute on the subject, and its construction and effect must now be dealt with.

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Chapter 69 of the Revised Statutes of 1906 is the statute applicable to this case. Sect. 7 is as follows: "7. Any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter, which was not known or used by any other person before his invention thereof, and which has not been in public use or on sale with the consent or allowance of the inventor thereof, for more than one year previously to his application for patent therefor in Canada, may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention."

This section raises several important and difficult questions, some of which have been determined by authority. It was decided in *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills* (1), that the public use or sale for more than a year previously to the application must be public use or sale in Canada, these words applying not to the application but to the public use or sale.

On the other hand, it has been decided by the Supreme Court in *Wright & Corson* v. *Brake Service, Ld.* (2), that the words "which was not known or used by any other person before his (the applicant's) invention thereof," are not qualified by the words "in Canada," and accordingly if it can be shown that the invention was known or used by any other person in any part of the world before the invention in Canada, that fact alone would render the patent invalid.

This is a very far-reaching pronouncement. It undoubtedly overturns patent law as understood in England, for it is quite certain that in English law if A. applied for and took out a patent it would be neither here nor there for B. to come forward and say: "I will show that I had already made the discovery, but I kept it to myself." A. had made a contribution to the public by showing them how to practise the invention. B. had made no such contribution, and therefore he had no rights in the matter. Also it obviously opens the door to defeat any invention, it may be after a long space of time when it has shown itself to be really valuable, by parol evidence which may be hard to check. Nevertheless, as a mere question of construction of the section, their Lordships are not prepared to differ from the Supreme Court on this point.

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(1) [1929] A. C. 269.
(2) [1926] S. C. R. 434.

The present case is a good instance of what may be called the danger of the matter. In accordance with what has already been said, their Lordships hold that Alexanderson's specification was not anticipated by the specification of Schloemilch and Von Bronk. Alexanderson had been enjoying the profits of his patent for many years, yet now it may be set aside not by Schloemilch and Von Bronk's specification but by what from the parol testimony may be held to be their knowledge. It must be clearly kept in view that the date of the knowledge or use by any other person is a date before the *invention*, not before the patent. This therefore lets in parol evidence to uphold, just as it has let it in to cut down. Now, taking the knowledge of Schloemilch and Von Bronk, as the Supreme Court has done, as at least ten or fourteen days prior to February 9, 1913, the date of the application for the German patent, how stands it here as to Alexanderson's invention? On February 4 Alexanderson wrote a letter to Davis in which he describes "the new system of tuning which I have devised," and he clearly sets out his method of tuning, as he expresses it, by geometrical progression. A copy of that letter was sent to Dr. Langmuir, who had had conversations with Alexanderson in January, and this is what he says about it, and the conversations he had: "Q. I would ask you to state whether or not, as one skilled in the art, at that time, the letter formed a disclosure to you of the subject-matter of the Alexanderson patent later in suit in this action? A. This letter covers practically the same ground as the conversations that I had had with Mr. Alexanderson during the preceding weeks. It gives a very clear summary of Mr. Alexanderson's ideas and describes the principles involved in the idea of tuning in geometrical progression, so clearly that it would have been sufficient

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even if I had not had any previous conversation with Mr. Alexanderson, to have enabled me to build the device and obtain the advantages of geometrical tuning which Mr. Alexanderson foresaw. Not only is the theory of the operation of this system described in this letter, but the means of accomplishing it by use of the audion is clearly described." The respondents' expert witness, Mr. Hazeltine, is asked as to this letter, and he criticizes the use of the word "rectify" used in it, but in cross-examination he admits that the writer is really referring not to a rectifier but to a type of audion which De Forest invented and which he expected Langmuir to improve.

The question really comes to this, and it is the root of the matter. The letter taken owing to Langmuir's evidence as being a mere reproduction of the conversation in January, shows the whole method, but indicates that one of the necessary parts of the contrivance must be of a certain quality. That is indicated by this sentence: "The device necessary to accomplish this is some form of high frequency relay which enables one high frequency current to control another high frequency circuit without the first circuit being influenced by the phenomena in the second circuit. Such a relay is the incandescent rectifier where the flow of current in the local circuit is controlled by a potential introduced in the path of the radiating energy." The well known relay was that of De Forest. It was suspected, though not actually proved, that it might prove too sluggish for a high frequency relay, but Langmuir improved on the De Forest relay and that was the relay that was included in the specification for the patent. Now, the Supreme Court has held that Alexanderson's invention was not completed till May, when, to quote their words, Dr. Langmuir had constructed audions which when tested were found to give a frequency in the relayed current equal to the incoming oscillations. The point is a narrow one, but their Lordships think that what is meant in the section by using the word "invention" instead of "application" or "patent" is that what is to be considered is the description whether spoken to or put in writing which really gives the means of making the desired thing which is to be the subject of the patent. In other words, the arrangement as to the audion was complete. The invention was a tuning by geometrical progression associated with a suitable audion which the modification of the De Forest audion proved to be. De Forest's audion might do. If it did not, then a modification of it would. It is just analogous to saying that a certain part of a machine should be of a strength capable to bear such-and-such a strain, without an indication of what the exact strength should be. Their Lordships are therefore of opinion that, fairly read, the evidence shows that Alexanderson had discovered his "invention" in January, 1913, and therefore he is not hit by the fact which is assumed that Schloemilch and Von Bronk also discovered it in February, 1913, though they did not proceed to make practical use of that discovery.

There remains one contention on the part of the respondents to be disposed of. The application for the present patent was made on September 17, 1920, and more than a year before this date—namely, on February 22, 1916, there had been issued to the applicant a patent for the same invention in the United States, and he was accordingly not entitled to the protection afforded by s. 8 of the Act of 1906, and under this Act his patent would have been void. Moreover, in the declaration required by s. 10 he had falsely stated that "the invention has not been patented to me or to others with my knowledge or consent in any country." By s. 29 it is provided that a patent shall be void if any material allegation in the petition or declaration of the applicant in respect of such patent is untrue. The appellants relied on this fact as destructive of the patent.

But in the meantime there had been passed an Act of 1921 containing the following section: "7.—(1.) A patent shall not be refused on an application filed between the first day of August, 1914, and the expiration of a period of six months from the coming into force of this Act, nor shall a patent granted on such application be held invalid by reason of the invention having been patented in any other country or in any other of

His Majesty's Dominions or Possessions or described in any printed publication or because it was in public use or on sale prior to the filing of the application, unless such patent or publication or such public use or sale was issued or made prior to the first day of August, 1913."

The application for the present patent was made during the period mentioned in the Act and accordingly it cannot be held invalid by reason of the earlier patent in the United States, and the misstatement in the declaration has become an immaterial allegation. The Act is clearly retroactive so far as regards the fact of the issue of a foreign patent, and it would be somewhat strange if it were held to have no retroactive effect as regards a false declaration as to that fact. The matter came before the Supreme Court in *Fada Radio, Ld.* v. *Canadian General Electric Co.* (1), and the question was decided in favour of the patentee on the ground that the statement had become immaterial. The only distinction between that case and the present is that there it was not, in the opinion of the Court, established " as conclusively as might be," that the issue of the foreign patent was known to the declarant, whereas in the present case he himself obtained the foreign patent. But, in their Lordships' opinion, this ought to make no difference in the result. The issue of the foreign patent becomes by the operation of the Act of 1921 an immaterial circumstance, and the allegation as to it is therefore also immaterial, and it becomes no less so though made by a person who knew, or at all events ought to have known, the truth.

All that is in question now is the validity of the patent; whether the declarant personally may be under any liability, criminal or otherwise, for his misstatement is another matter. In their Lordships' opinion, this objection fails.

Their Lordships will therefore humbly advise His Majesty to allow the appeal and restore the judgment of the Exchequer Court, the appellants to have their costs before this Board and in the Courts below.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

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(1) [1927] S. C. R. 520.

[PRIVY COUNCIL.]

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Oct. 15.

ATTORNEY-GENERAL FOR CANADA . APPELLANT;

AND

ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority—Fisheries—Fish Canneries—Construction of Fishing Regulations—Whether Power to grant Licences discretionary—Fisheries Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 8, *Can.*), *ss.* 7A, 18—*British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *ss.* 91, 92.

Sects. 7A and 18 of the Fisheries Act, 1914, of Canada, as amended, which provide that no one shall operate for commercial purposes a fish cannery, or in British Columbia a salmon cannery or curing establishment, without a licence from the Minister of Marine and Fisheries, are ultra vires the Parliament of Canada. The sections purport to confer upon the Minister powers which fall under s. 92, head 13 (property and civil rights in the Provinces) of the British North America Act, 1867, and are not directly or incidentally within s. 91, head 12 (sea coast and inland fisheries), or any other enumeration in s. 91. The fact that Canadian fishery legislation before 1867 had dealt with similar matters is not a ground for putting an unnatural construction upon the words of s. 91, head 12.

Four propositions relative to legislative competence in Canada stated as being established by decisions of the Judicial Committee.

The special fishery regulations for British Columbia, made under s. 45 of the Fisheries Act, 1914, do not expressly or by implication give the Minister discretion to withhold a licence to fish from an applicant thereby qualified, and the Minister therefore has not that discretion.

Judgment of the Supreme Court of Canada [1928] S. C. R. 457 affirmed.

APPEAL (No. 73 of 1928) by special leave from a judgment of the Supreme Court of Canada, dated May 28, 1928, answering questions referred to that Court by the Governor General under s. 60 of the Supreme Court Act of Canada.

The three questions referred are set out in the judgment of the Judicial Committee. They were shortly: (1.) whether ss. 7A and 18 of the Fisheries Act, 1914, of Canada (being 4 & 5 Geo. 5, c. 8, as amended), were ultra vires in whole or in part; (2.) a question as to the effect of the sections, if valid; (3.) whether in the case of licences required by certain Special Fishery Regulations for British Columbia (made under s. 45 of the above Act) and those required by ss. 7A and 18 (if valid), the Minister had a discretion to grant or refuse an application.

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* *Present:* LORD SANKEY L.C., LORD DARLING, LORD TOMLIN, LORD THANKERTON, and SIR LANCELOT SANDERSON.

Sects. 7A and 18 are also set out in the present judgment. They provided that no one should operate for commercial purposes a fish cannery (s. 7A), or in British Columbia a salmon cannery or curing establishment (s. 18), without a licence from the Minister of Marine and Fisheries. The fee prescribed by s. 7A for an annual licence was one dollar; the fees under s. 18 were substantial in amount and dependent upon the quantity of salmon dealt with.

The Supreme Court of Canada (Anglin C.J. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.) held unanimously that ss. 7A and 18 were wholly ultra vires, consequently no answer to the second question was needed. As to the third question the Court was divided in opinion. The majority (the Chief Justice, Newcombe, Rinfret and Lamont JJ.) held that the Minister was bound to grant the licences referred to in the Regulations to any person within the classes of persons prescribed therein upon his tendering the fee provided. The minority (Duff, Mignault and Smith JJ.) were of opinion that the Minister had a discretion to grant or refuse the licence to an applicant.

The proceedings are reported at [1928] S. C. R. 457.

1929. July 9, 11, 12, 15. *Macmillan K.C.* (with him *Lafleur K.C.*, *Plaxton K.C.* and *Theobald Mathew*) for the appellant. The Parliament of Canada had authority to enact ss. 7A and 18 of the Fisheries Act, 1914, under the British North America Act, 1867, s. 91, head 12, "sea coast and inland fisheries"; in aid of the authority so given the appellant relies upon s. 91, head 2, "the regulation of trade and commerce." The operation of canneries and curing establishments is inseparably connected with the conduct of the fisheries, and is within head 12. Even if the provisions are not directly within that head so as to be valid as substantive legislation, although conflicting with s. 92, they are reasonably necessary as ancillary provisions, so as to make effective legislation which was strictly within s. 91, head 12. By decisions of the Board ancillary provisions of that character in a Dominion statute are valid, even though they conflict with the enumerated heads under s. 92. The Supreme Court took too narrow a view of the scope of s. 91, head 12, which was intended to give to the Dominion Parliament exclusive control over fisheries regarded as a Canadian national asset. Fisheries Acts passed in 1788 and 1859 had dealt with the curing and marketing of fish; the word "fisheries," as used in the Act of 1867, was intended to include matters of that kind. Similar matters are within the operation of fishery boards in England and Scotland, and were dealt with by the report of the Commissions on Fisheries, 1905–7. [Reference was made to *Russell* v. *The Queen* (1); *Hodge* v. *The Queen* (2); *Citizens Insurance Co. of Canada* v. *Parsons* (3); *Tennant* v. *Union Bank of Canada* (4); *Attorney-General of Ontario* v. *Attorney-General for Canada* (5); *Attorney-General for Ontario* v. *Attorney-General for Dominion* (6); *Attorney-General for Canada* v. *Attorneys-General for the Provinces of Ontario, etc.* (7); *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada* (8); *Toronto Corporation* v. *Canadian Pacific Ry. Co.* (9); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (10); *Paquet* v. *Pilots' Corporation* (11); *Royal Bank of Canada* v. *Larue* (12); *Reg.* v. *Robertson* (13); Lefroy's Canadian Federal System, 2nd ed., p. 169; and *McCulloch* v. *State of Maryland.* (14)] As to question 2: the word "canning" in ss. 7A and 18 is not defined, and should be construed as including a floating cannery. As to question 3: the authority of the Minister under the sections and regulations is in form discretionary. There is nothing in their terms, or in the scope and objects of the legislation, from which there is to be implied, upon the principles laid down in *Julius* v. *Bishop of Oxford* (1), a legal duty upon the Minister.

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(1) (1882) 7 App. Cas. 829.
(2) (1883) 9 App. Cas. 117, 130.
(3) (1881) 7 App. Cas. 96.
(4) [1894] A. C. 31.
(5) [1894] A. C. 189, 200.
(6) [1896] A. C. 348.
(7) [1898] A. C. 700.
(8) [1907] A. C. 65.
(9) [1908] A. C. 54.
(10) [1914] A. C. 153.
(11) [1920] A. C. 1029.
(12) [1928] A. C. 187.
(13) (1882) 6 Can. S. C. R. 52.
(14) (1819) 4 Wheaton, 316.

Hon. Geoffrey Lawrence K.C. (with him *Wilfrid Barton*) for the Attorney-General for British Columbia; *Geoffrion K.C.* (with him *M. Alexander*) for the Attorney-General for Quebec; *Hon. Geoffrey Lawrence K.C.* for the Attorney-General for Ontario; *E. F. Newcombe K.C.* for the fishermen of Japanese origin in British Columbia. Sects. 7A and 18 of the Fisheries Act, 1914, are ultra vires. They do not relate to fisheries but to fish canneries for commercial purposes. The right to carry on a fish cannery is a civil right in the Province in which it is carried on. Fish after being caught are property in the Province where they may be. The sections therefore related directly to "property and civil rights in the Province," matters within the exclusive legislative power of the Province by s. 92, head 13, of the British North America Act, 1867. Nor were the provisions so related to the subject "fisheries" as to be valid under s. 91, head 12. Provisions in order to be valid as ancillary must be not merely convenient and reasonable, but necessary to the proper exercise of the enumerated head: *Attorney-General of Ontario* v. *Attorney-General for Canada* (2); *Attorney-General for Ontario* v. *Attorney-General for Dominion* (3); *City of Montreal* v. *Montreal Street Ry.* (4); dissenting judgment of Duff J. in *British Columbia Electric Ry. Co.* v. *Vancouver, Victoria and Eastern Ry., &c., Co.* (5), approved by the Privy Council on appeal (6); *Great West Saddlery Co.* v. *The King.* (7) There was no evidence of conditions which made the provisions necessary in relation to the fisheries. The Supreme Court, which was cognizant of conditions in Canada, and included judges peculiarly versed in the authorities as to legislative competence, were unanimous in holding that

(1) (1880) 5 App. Cas. 214.
(2) [1894] A. C. 189, 200.
(3) [1896] A. C. 348, 359, 360.
(4) [1912] A. C. 333, 343.
(5) (1913) 48 Can. S. C. R. 98, 102.
(6) [1914] A. C. 1067.
(7) [1921] 2 A. C. 91, 116, 120, 121.

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the sections were ultra vires. The authority of the Dominion with regard to "the regulation of trade and commerce" does not enable the Dominion to legislate as to a particular trade in a Province: *Citizens Insurance Co. of Canada* v. *Parsons* (1); *Attorney-General for Canada* v. *Attorney-General for Alberta.* (2) The Regulations upon their true construction do not enable the Minister to refuse a licence to any person within the classes named. There is a public right of fishing in tidal waters: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3); the Regulations should not be interpreted so as to derogate from that right, nor from private rights to fish. If they had that effect they would be ultra vires, but no question as to their validity was referred.

Macmillan K.C. replied.

Oct. 15. The judgment of their Lordships was delivered by

LORD TOMLIN. This is an appeal from a judgment dated May 28, 1928, of the Supreme Court of Canada. The appellant is the Attorney-General of the Dominion of Canada. The respondents are the Attorneys-General of the Provinces of British Columbia, Quebec and Ontario and the fishermen of Japanese origin in the Province of British Columbia.

By an Order of His Excellency the Governor General in Council, dated October 19, 1928, and made pursuant to the provisions of s. 60 of the Supreme Court Act, three questions as to the constitutional validity of certain sections of the Fisheries Act, 1914, and as to the interpretation of those sections, and of certain Regulations made under that Act were referred to the Supreme Court for hearing and consideration.

The judgment complained of embodies the conclusions of the Supreme Court upon the questions referred. The questions were as follows:—

"(1.) Are ss. 7A and 18 of the Fisheries Act, 1914, or either of them and in what particular or particulars or to what extent ultra vires of the Parliament of Canada?

(1) 7 App. Cas. 96.
(2) [1916] 1 A. C. 588.
(3) [1914] A. C. 153.

"(2.) If the said provisions of the Fisheries Act, 1914, or either of them be intra vires of the Parliament of Canada, has the Minister authority to issue a licence for the operation of a floating cannery constructed on a float or ship, as contradistinguished from a stationary cannery constructed on land, and if so, is he entitled to make the licence subject to any restrictions particularly as to the place of operation of any such cannery in British Columbia ?

"(3.) Under the provisions of the Special Fishery Regulations for the Province of British Columbia (made by the Governor in Council, under the authority of s. 45 of the Fisheries Act, 1914), respecting licences to fish—namely, sub-s. 3 of s. 14 ; para. (*a*) or (*b*) of sub-s. 1 of s. 15 or para. (*a*) of sub-s. 7 of s. 24 of the said Regulations, or under said ss. 7A or 18 of the said Act (if these sections or either of them be intra vires of the Parliament of Canada) has : (*a*) any British subject resident in the Province of British Columbia ; or (*b*) any person so resident who is not a British subject, upon application and tender of the prescribed fee, the right to receive a licence to fish or to operate a fish or salmon cannery in that Province, or has the Minister a discretionary authority to grant or refuse such licence to any such person whether a British subject or not ?"

The Supreme Court held that the sections mentioned in the first question were ultra vires the Parliament of the Dominion, and that in view of this conclusion the second question and so much of the third question as related to the impugned sections required no answer. As to the remainder of the third question a majority of the Court held in effect that under the Regulations there was no discretion in the Minister to grant or refuse a licence to a qualified person.

In order to answer the first question it is necessary to examine the extent of the respective legislative powers of the Parliament of the Dominion and of the Provincial Legislatures. These powers rest upon the British North America Act, 1867. Part VI. of the Act is entitled "Distribution of legislative powers," and includes ss. 91 and 92.

Sect. 91 is headed "powers of the parliament," and provides as follows: "91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated."

There then follows an enumeration of twenty-nine subjects, including: (1.) The public debt and property; (2.) the regulation of trade and commerce; (3.) the raising of money by any mode or system of taxation; (10.) navigation and shipping; (12.) sea coast and inland fisheries; and (29.) such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the provinces. The section then concludes with these words: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces."

Sect. 92 is headed "Exclusive Powers of Provincial Legislatures," and provides that in each Province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next therein enumerated. There follows an enumeration of sixteen subjects, including (2.) direct taxation within the province, in order to the raising of a revenue for provincial purposes; (10.) local works and undertakings other than such as are of certain classes mentioned therein; (13.) property and civil rights in the Province, and (16.) generally, all matters of a merely local or private nature in the province.

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Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated :—

(1.) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92 : see *Tennant* v. *Union Bank of Canada.* (1)

(2.) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (2)

(3.) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91 : see *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (3) ; and *Attorney-General for Ontario* v. *Attorney-General for the Dominion.* (2)

(4.) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail : see *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada.* (4)

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(1) [1894] A. C. 31.
(2) [1896] A. C. 348.
(3) [1894] A. C. 189.
(4) [1907] A. C. 65.

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The impugned sections of the Fisheries Act, 1914, are in the following terms :—

" 7A. No one shall operate a fish cannery for commercial purposes without first obtaining an annual licence therefor from the Minister. Where no other fee is in this Act prescribed for a cannery licence, the annual fee for each such licence shall be one dollar (1917, c. 16).

" 18. No one shall operate a salmon cannery or salmon curing establishment in British Columbia for commercial purposes except under a licence from the Minister (1–2 Geo. 5, c. 9, s. 2).

" (2.)—(*a*) The annual fee for a salmon cannery licence shall be twenty dollars, and in addition, four cents for each case of forty-eight one pound cans, or the equivalent thereto, of sock-eye salmon, and three cents for each case of forty-eight one pound cans, or the equivalent thereto, of any other species of salmon, including steelhead (salmo rivularis) packed in such cannery during the continuance in force of the licence. The said twenty dollars shall be paid before the licence is issued, and the remainder of the licence fee shall be paid as the Minister may from time to time by regulation prescribe (1924, c. 43, 14–15 Geo. 5).

(*b*) The annual licence fee for a salmon-curing establishment shall be :—

Fifty cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season does not exceed ten tons ;

Seventy-five cents on each ton or fraction thereof of dry salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds ten tons but is not more than twenty tons.

One dollar on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds twenty tons but is not more than fifty tons ;

One dollar and twenty-five cents on each ton or fraction thereof of dry-salted salmon put up in the establishment during the season, when the total quantity of dry-salted salmon put up in one season exceeds fifty tons (12–13 Geo. 5, c. 24, s. 1)."

The appellant seeks to support the validity of these sections first upon the ground that their subject matter is one within the subjects of express enumeration in s. 91, and secondly upon the ground that they consist of provisions necessarily incidental to effective legislation upon an enumerated subject.

The Fisheries Act, 1914, is "An Act . . . . respecting fisheries and fishing," and contains a body of legislation regulating the fishing industry, and so far as it regulates that industry admittedly within the powers of the Dominion Parliament, inasmuch as sea coast and inland fisheries is one of the subjects enumerated in s. 91.

The appellant contends in the first place that the subject "sea coast and inland fisheries" covers such matters as the regulation of fish cannery or curing establishments, either ashore or afloat, and that the imposition of a licensing system upon such establishments is therefore justified.

It is to be observed that by s. 2 of the Fisheries Act, 1914, "fishery" in that Act means and includes the area, locality place or station in or on which a pound, seine, net, weir, or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing applicance, and also the pound, seine, net, weir or other fishing appliance used in connection therewith.

It may well be that this definition is not an apt one to apply to the words "sea coast and inland fisheries" in s. 91 of the British North America Act, 1867. The appellant, however, seeks for the word "fisheries" in the latter Act a definition of such amplitude that it will include the operations carried out upon the fish when caught for the purpose of converting them into some form of marketable commodity. He supports his contention by referring to fishery legislation prior to 1867 affecting territories now part of the Dominion, pointing out that in this legislation there are to be found numerous provisions relating to the curing and marketing of fish, and he urges that the British North America Act, 1867, must be construed in the light of the earlier legislation, and that the word "fisheries" must be given such a meaning as is wide enough to include at any rate the operations affected by the impugned sections.

Their Lordships are of opinion that the appellant's contention in this respect is not well founded. The fact that in earlier fishery legislation raising no question of legislative competence matters are dealt with not strictly within any ordinary definition of "fishery" affords no ground for putting an unnatural construction upon the words "sea coast and inland fisheries." In their Lordships' judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "sea coast and inland fisheries."

It was but faintly urged by the appellant that the matter was covered by any other of the enumerated subjects in s. 91. The raising of money by any mode or system of taxation was admitted not to be applicable, and their Lordships are unable to see that any other enumerated subject under s. 91 applies.

The second point made by the appellant is that the licensing of fish canning and curing establishments is necessarily incidental to effective legislation under the subject "sea coasts and inland fisheries."

It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships' Board establishing the necessary connection between the two subject matters. In their Lordships' view, therefore, the appellant's second contention is not well founded.

The impugned sections confer powers upon the Minister in relation to matters which in their Lordships' judgment prima facie fall under the subject "property and civil rights in the province," included in s. 92 of the British North America Act, 1867. As already indicated, these matters are not in their Lordships' opinion covered directly or incidentally by any of the subjects enumerated in s. 91. It is not suggested that they are of national importance and have attained such dimensions as to affect the body politic of the Dominion.

In their Lordships' judgment, therefore, the impugned sections deal with matters not within the legislative competence of the Parliament of the Dominion and cannot be supported.

Having regard to the view which their Lordships take of the first question the second question requires no answer.

It remains to deal with the third question.

So far as this question deals with the sections which are the subject of the first question it now requires no answer. That part of it, however, which deals with certain provisions of the Special Fishery Regulations for the Province of British Columbia must be considered. The validity of these provisions is not attacked; their construction only is in question.

The following are the terms of these provisions:—

"Sect. 14.—Herring or Pilchard.

"(3.) If the captain of a herring or pilchard drag-seine or purse-seine boat that is being used in operating a herring or pilchard drag-seine or purse-seine is not himself the licensee of the said drag-seine or purse-seine, he shall require a licence from the Minister to authorise his operation of the said drag-seine or purse-seine; and no other than a British subject shall be elegible for such licence. The fee for such licence shall be one dollar.

"Section 15.—Leases or Licences.

"(1.) (*a*) Except as herein otherwise provided fishing with nets or other apparatus, and the taking of abalone or crabs, except under licence from the Minister is prohibited; and in salmon fishing no one shall act as a boat puller or be otherwise employed in a boat used in salmon drifting, or as a helper, or in any other capacity in operating a purse-seine or drag-seine that is being used in salmon fishing except under licence from the Minister.

"(*b*) No licence shall be granted to any person, company or firm unless such person is a British subject resident in the Province or is a returned soldier, who has served in His Majesty's Canadian Navy or Army overseas, or to such company or firm unless it is a Canadian company or firm or is authorized by the Provincial Government to do business in the province.

"Sect. 24.—Salmon.

"(7.)—(*a*) No one shall fish for salmon for commercial purposes by means of trolling, except under licence from the Minister. Each person in a boat that is being used in trolling for salmon shall be required to have a licence."

The question here is one of construction. Do the regulations, rightly interpreted, give to the Minister any discretion in granting or refusing a licence where it is applied for by a qualified person?

The regulations in question affect both public and private rights of fishing. There is no express provision for withholding a licence where a qualified applicant submits a proper application and pays the small prescribed fee, and in their Lordships' judgment there is nothing in the language of the regulations giving rise to a necessary implication that the Minister has a discretion to grant or withhold the licence. Their Lordships agree with the answer which the majority of the Supreme Court gave to the third question.

In the result, therefore, the appeal fails, and should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

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In accordance with the usual practice there will be no costs of the appeal as between the appellant and the respondent Attorneys-General, but the respondent fishermen will have their costs of the appeal.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondents: *Gard, Lyell & Co.; Blake & Redden; Kays & Jones.*

[PRIVY COUNCIL.]

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HENRIETTA MUIR EDWARDS AND OTHERS . . . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Constitution—Senate—Eligibility of Women—"Persons"—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 23, 24.

The word "persons" in s. 24 of the British North America Act, 1867, includes members of either sex; accordingly women having the qualifications enacted by s. 23, can be summoned by the Governor General to the Senate of Canada.

So *held* upon an examination of the Act, earlier Canadian legislation being inconclusive as to the intention of the Imperial Parliament in the matter, and decisions in England based upon the disability at common law of women to hold public office being inapplicable to the interpretation of the Act.

The provisions of the British North America Act, 1867, enacting a constitution for Canada should not be given a narrow and technical construction, but a large and liberal interpretation, so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

Judgment of the Supreme Court of Canada [1928] S. C. R. 276 reversed.

APPEAL (No. 121 of 1928) by special leave from a judgment of the Supreme Court of Canada, dated April 24, 1928, in answer to a question referred to that Court by the Governor General under s. 60 of the Supreme Court Act.

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* *Present:* LORD SANKEY L.C., LORD DARLING, LORD MERRIVALE, LORD TOMLIN, and SIR LANCELOT SANDERSON.

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The question referred was "Does the word 'persons' in s. 24 of the British North America Act, 1867, include female persons?"

By s. 24: "The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator."

By s. 23: "The qualifications of a senator shall be as follows:—(1.) He shall be of the full age of thirty years: (2.) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the legislature of one of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the union, or of the Parliament of Canada after the union: (3.) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in francalleu or in roture, within the province for which he is appointed, of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same: (4.) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities: (5.) He shall be resident in the province for which he is appointed: (6.) In the case of Quebec he shall have his real property qualification in the electoral division for which he is appointed, or shall be resident in that division."

The effect of other sections of the Act material to the question, more particularly ss. 41, 84, 133, is stated in the judgment printed below.

The Supreme Court of Canada unanimously answered the question referred in the negative. Anglin C.J., whose judgment was concurred in by Lamont and Smith JJ., and substantially by Mignault J., came to the above conclusion because of the common law disability of women to hold public office. Duff J., while of opinion that that consideration should not be applied, came to the same conclusion upon an examination of the provisions of the Act. The proceedings are reported at [1928] S. C. R. 276.

1929. July 22, 23, 25, 26. *Rowell K.C.*, with him *Lyndburn (A.-G. for Alberta)* and *Frank Gavan*, for the appellants.

Lafleur K.C., *Hon. Geoffrey Lawrence K.C.*, with them *Theobald Mathew*, for the respondents.

The arguments relied upon, both for the appellants and for the respondents, and the cases cited, appear from the judgment of the Judicial Committee.

Oct. 18. The judgment of their Lordships was delivered by

LORD SANKEY L.C. By s. 24 of the British North America Act, 1867, it is provided that "The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a senator."

The question at issue in this appeal is whether the words "qualified persons" in that section include a woman, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada.

Of the appellants, Henrietta Muir Edwards is the Vice-President for the Province of Alberta of the National Council of Women for Canada; Nellie L. McClung and Louise C. McKinney were for several years members of the Legislative Assembly of the said Province; Emily F. Murphy is a police magistrate in and for the said Province; and Irene Parlby is a member of the Legislative Assembly of the said Province and a member of the Executive Council thereof.

On August 29, 1927, the appellants petitioned the Governor General in Council to refer to the Supreme Court certain questions touching the powers of the Governor General to summon female persons to the Senate, and upon October 19, 1927, the Governor General in Council referred to the Supreme Court the aforesaid question. The case was heard before Anglin C.J., Duff, Mignault, Lamont, and Smith JJ., and upon April 24, 1928, the Court answered the question in the negative; the question being understood to be "Are women eligible for appointment to the Senate of Canada."

The Chief Justice, whose judgment was concurred in by Lamont and Smith JJ., and substantially by Mignault J., came to this conclusion upon broad lines mainly because of the common law disability of women to hold public office and from a consideration of various cases which had been decided under different statutes as to their right to vote for a member of Parliament.

Duff J., on the other hand, did not agree with this view. He came to the conclusion that women are not eligible for appointment to the Senate upon the narrower ground that upon a close examination of the British North America Act, 1867, the word "persons" in s. 24 is restricted to members of the male sex. The result therefore of the decision was that the Supreme Court was unanimously of opinion that the word "persons" did not include female persons, and that women are not eligible to be summoned to the Senate.

Their Lordships are of opinion that the word "persons" in s. 24 does include women, and that women are eligible to be summoned to and become members of the Senate of Canada.

In coming to a determination as to the meaning of a particular word in a particular Act of Parliament it is permissible to consider two points—namely: (i.) The external evidence derived from extraneous circumstances such as previous legislation and decided cases. (ii.) The internal evidence derived from the Act itself. As the learned counsel on both sides have made great researches and invited their Lordships to consider the legal position of women from the earliest times, in justice to their argument they propose to do so and accordingly turn to the first of the above points—namely: (i.) The external evidence derived from extraneous circumstances.

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary. Such exclusion is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms, and women did not bear arms. "Nihil autem neque publicae neque privatae rei, nisi armati, agunt": Tac. Germ., c. 13. Yet the tribes did not despise the advice of women. "Inesse quin etiam sanctum et providum putant, nec aut consilia earum aspernantura ut responsa neglegunt": Germ., c. 8. The likelihood of attack rendered such a proceeding unavoidable, and after all what is necessary at any period is a question for the times upon which opinion grounded on experience may move one way or another in different circumstances. This exclusion of women found its way into the opinions of the Roman jurists, Ulpian (A.D. 211) laying it down. "Feminae ab omnibus officiis civilibus vel publicis remotae sunt": Dig. 1.16.195. The barbarian tribes who settled in the Roman Empire, and were exposed to constant dangers, naturally preserved and continued the tradition.

In England no woman under the degree of a Queen or a Regent, married or unmarried, could take part in the government of the State. A woman was under a legal incapacity to be elected to serve in Parliament and even if a peeress in her own right she was not, nor is, entitled as an incident of peerage to receive a writ of summons to the House of Lords.

Various authorities are cited in the recent case of *Viscountess Rhondda's Claim* (1), where it was held that a woman was not entitled to sit in the House of Lords. Women were, moreover, subject to a legal incapacity to vote at the election of members of Parliament: Coke, 4 Inst., p. 5; *Chorlton* v. *Lings* (2); or of town councillor: *Reg.* v. *Harrald* (3); or to be elected members of a County Council: *Beresford-Hope* v. *Sandhurst.* (4) They were excluded by the common law from taking part in the administration of justice either as judges

(1) [1922] 2 A. C. 339.

(2) (1868) L. R. 4 C. P. 374.

(3) (1872) L. R. 7 Q. B. 361.

(4) (1889) 23 Q. B. D. 79.

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or as jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy: Coke, 2 Inst. 119, 3 Bl. Comm. 362. Other instances are referred to in the learned judgment of Willes J. in *Chorlton* v. *Lings*. (1)

No doubt in the course of centuries there may be found cases of exceptional women and exceptional instances, but as Lord Esher M.R. said in *De Souza* v. *Cobden* (2): "By the common law of England women are not in general deemed capable of exercising public functions, though there are certain exceptional cases where a well recognised custom to the contrary has become established." An instance may be referred to in the case of women being entitled to act as churchwardens and as sextons, the latter being put upon the ground that a sexton's duty was in the nature of a private trust: *Olive* v. *Ingram*. (3) Also of being appointed as overseer of the poor: *Rex* v. *Stubbs*. (4) The tradition existed till quite modern times: see *Bebb* v. *Law Society* (5), where it was held by the Court of Appeal that by inveterate usage women were under a disability by reason of their sex to become attorneys or solicitors.

The passing of Lord Brougham's Act in 1850 does not appear to have greatly affected the current of authority. Sect. 4 provided that in all acts words importing the masculine gender shall be deemed and taken to include female unless the contrary as to gender is expressly provided.

The application and purview of that Act came up for consideration in *Chorlton* v. *Lings* (1), where the Court of Common Pleas was required to construe a statute passed in 1861, which conferred the parliamentary franchise on every man possessing certain qualifications and registered as a voter. The chief question discussed was whether by virtue of Lord Brougham's Act the words "every man" included women. Bovill C.J., having regard to the subject-matter of the statute and its general scope and language and to the important and striking nature of the departure from the common law involved in extending the franchise to women, declined to accept the view that Parliament had made that change by using the term "man" and held that the word was intentionally used expressly to designate the male sex. Willes J. said: "It is not easy to conceive that the framer of that Act, when he used the word 'expressly,' meant to suggest that what is necessarily or properly implied by language is not expressed by such language."

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(1) (1868) L. R. 4 C. P. 374.
(2) [1891] 1 Q. B. 687, 691.
(3) (1738) 7 Mod. 263.
(4) (1788) 2 T. R. 395.
(5) [1914] 1 Ch. 286.

Great reliance was placed by the respondents to this appeal upon that decision, but in our view it is clearly distinguishable. The case was decided on the language of the Representation of the People Act, 1867, which provided that "every man" with certain qualifications and "not subject to any legal incapacity" should be entitled to be registered as a voter. Legal incapacity was not defined by the Act, and consequently reference was necessary to the common law disabilities of women.

A similar result was reached in the case of *Nairn* v. *University of St. Andrews* (1), where it was held under s. 27 of the Representation of the People (Scotland) Act, 1868, which provided that every person whose name is for the time being on the register of the general council of such university shall, being of full age and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university, that the word "person" did not include women, but the Lord Chancellor, Lord Loreburn, referred to the position of women at common law, and pointed out that they were subject to a legal incapacity. Both in this case and in the case of the Viscountess Rhondda the various judgments emphasize the fact that the legislature in dealing with the matter cannot be taken to have departed from the usage of centuries, or to have employed loose and ambiguous words to carry out a so momentous and fundamental change.

The judgment of the Chief Justice in the Supreme Court of Canada refers to and relies upon these cases, but their Lordships think that there is great force in the view taken by Duff J. with regard to them, when he says that s. 24 of the British North America Act, 1867, must not be treated as an independent enactment. The Senate, he proceeds, is part of a parliamentary system, and in order to test the contention based upon this principle that women are excluded from participating in working the Senate or any other institution set up by the Act one is bound to consider the Act as a whole and its bearings on this subject of the exclusion of women from public office and place.

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(1) [1909] A. C. 147.

Their Lordships now turn for a moment to the special history of the development of Canadian legislature as bearing upon the matter under discussion.

The Province of Canada was formed by the union under the Act of Union, 1840, of the two Provinces of Upper and Lower Canada respectively, into which the Province of Quebec as originally created by the royal proclamation of October 7, 1763, and enlarged by the Quebec Act, 1774, had been divided under the Constitutional Act of 1791. In the Province of Quebec from its first establishment in 1763 until 1774, the Government was carried on by the Governor and the Council, composed of four named persons and eight other "persons" to be chosen by the Governor from amongst "the most considerable of the inhabitants or of other persons of property in Our said Province."

The Quebec Act of 1774 entrusted the government of the Province to a Governor and Legislative Council of such "persons" resident there, not exceeding twenty-three, nor less than seventeen, as His Majesty shall be pleased to appoint.

The Constitutional Act of 1791 upon the division of the Province of Quebec into two separate Provinces to be called the Provinces of Upper and Lower Canada established for each Province a legislature composed of the three estates of Governor, Legislative Council and Assembly empowered to make laws for the peace, order and good government of the Provinces. The Legislative Council was to consist of a sufficient number of discreet and proper "persons" not less than seven for Upper Canada and fifteen for Lower Canada.

Under the Act of Union, 1840, these two Provinces were reunited so as to constitute one Province under the name of the Province of Canada, and the Legislative Council was to be composed of such " persons " being not fewer than twenty as Her Majesty shall think fit.

In 1865 the Canadian legislature under the authority of the Imperial Act passed an Act which altered the constitution of the Legislative Council by rendering the same elective.

The new constitution as thus altered continued till the Union of 1867.

It will be noted that in all the Acts the word " persons " is used in respect of those to be elected members of the Legislative Council, and there are no adjectival phrases so qualifying the word as to make it necessarily refer to males only.

In Quebec, just as in England, there can be found cases of exceptional women and exceptional instances. For example, in certain districts—namely, at Trois Rivières in 1820—women apparently voted, while in 1828 the returning officer in the constituency of the Upper Town of Quebec refused to receive the votes of women.

In 1834 the Canadian Parliament passed an Act of Parliament excluding women from the vote, but two years later the Act was disallowed, because the Imperial Government objected to another section in it.

The matter, however, was not left there, and in 1849 by a statute of the Province of Canada (12 Vict. c. 27), s. 46, it was declared and enacted that no woman is or shall be entitled to vote at any election, whether for any county or riding, city or town, of members to represent the people of this Province in the Legislative Assembly thereof.

The development of the maritime Provinces proceeded on rather different lines. From 1719 to 1758 the Provincial Government of Nova Scotia consisted of a Governor and a Council, which was both a legislative and an executive body composed of such fitting and discreet " persons," not exceeding twelve in number, as the Governor should nominate. A general assembly for the Province was called in 1757, and thereafter the legislature consisted of a Governor and Council and General Assembly. In 1838 the executive authority was separated from the Legislative Council, which became a distinct legislative branch only.

In 1784 a part of the territory of the Province of Nova Scotia was erected into a separate Province to be called New Brunswick, and a separate government was established for the Province, consisting of a Governor and Council composed of certain named persons and other persons "to be chosen by you from amongst the most considerable of the inhabitants of or persons of property," but required to be men of good life and of ability suitable to their employment. In 1832 the executive authority was separated and made distinct from the Legislative Council. In the Province of Nova Scotia there was in the early Acts governing the election of members of the General Assembly no express disqualification of women from voting, but by the revised statutes of Nova Scotia (second series) in 1859 the exercise of the franchise was confined to male subjects over twenty-one years of age, and a candidate for election was required to have the qualification which would enable him to vote.

In the Province of New Brunswick by the Provincial Act (11 Vict. c. 65), s. 17, the Parliamentary franchise was confined to male persons of the full age of twenty-one years who possessed certain property qualifications.

It must, however, be pointed out that a careful examination has been made by the assistant keeper of public records of Canada of the list containing the names of the Executive and Legislative Councils and Houses of Assembly in Quebec (including those of Upper and Lower Canada), of the Province of Canada, of the Province of Nova Scotia and of the Province of New Brunswick down to 1867, and on none of the lists did he find the name of a person of the female sex.

Such briefly is the history and such are the decisions in reference to the matter under discussion.

No doubt in any code where women were expressly excluded from public office the problem would present no difficulty, but where instead of such exclusion those entitled to be summoned to or placed in public office are described under the word " person " different considerations arise.

The word is ambiguous, and in its original meaning would undoubtedly embrace members of either sex. On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but the cause of this was not because the word " person " could not include females but because at common law a woman was incapable of serving a public office. The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made or the point being contested.

Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.

The appeal to history therefore in this particular matter is not conclusive.

As far back as *Stradling* v. *Morgan* (1) it was laid down that extraneous circumstances may be admitted as an aid to the interpretation of a statute, and in *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (2) Lord Halsbury L.C. said: "The subject matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act," but the argument must not be pushed too far, and their Lordships are disposed to agree with Farwell L.J. in *Rex* v. *West Riding of Yorkshire County Council* (3), " although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are extremely slight " : see Craies, Statute Law, 3rd ed., p. 118.

Over and above that, their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the

(1) (1559) 1 Plow. 199.

(2) [1892] A. C. 498, 502.

(3) [1906] 2 K. B. 676, 716.

reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development. Referring therefore to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act of 1867.

Their Lordships fully appreciate the learned arguments set out in his judgment, but prefer, on this part of the case, to adopt the reasonings of Duff J., who did not agree with the other members of the Court, for reasons which appear to their Lordships to be strong and cogent. As he says: "Nor am I convinced that the reasoning based upon the 'extraneous circumstances' we are asked to consider (the disabilities of women under the common law and the law and practice of Parliament in respect of appointment to public place or office) establishes a rule of interpretation for the British North America Act, by which the construction of powers, legislative and executive, bestowed in general terms is controlled by a presumptive exclusion of women from participating in the working of the institutions set up by the Act."

Their Lordships now turn to the second point—namely, (ii.) the internal evidence derived from the Act itself.

Before discussing the various sections they think it necessary to refer to the circumstances which led up to the passing of the Act.

The communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution. His Majesty the King in Council is the final Court of Appeal from all these communities, and this Board must take great care therefore not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another. Canada had its difficulties both at home and with the mother country, but soon discovered that union was strength. Delegates from the three maritime Provinces met in Charlottetown on September 1, 1864, to discuss proposals for a maritime union. A delegation from the coalition government of that day proceeded to Charlottetown and placed before the maritime delegates their schemes for a union embracing the Canadian Provinces. As a result the Quebec conference assembled on October 10, continued in session till October 28, and framed a number of resolutions. These resolutions as revised by the delegates from the different Provinces in London in 1866 were based upon a consideration of the rights of others and expressed in a compromise which will remain a lasting monument to the political genius of Canadian statesmen. Upon those resolutions the British North America Act of 1867 was framed and passed by the Imperial legislature. The Quebec resolutions dealing with the Legislative Council—namely, Nos. 6–24—even if their Lordships are entitled to look at them, do not shed any light on the subject under discussion. They refer generally to the " members " of the Legislative Council.

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. " Like all written constitutions it has been subject to development through usage and convention " : Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. "The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes ; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony" : see Clement's Canadian Constitution, 3rd ed., p. 347.

The learned author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1) : "That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words." With that their Lordships agree, but as was said by the Lord Chancellor in *Brophy* v. *Attorney-General of Manitoba* (2), the question is not what may be supposed to have been intended, but what has been said.

It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its Provinces which arise under ss. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its Provinces their respective spheres of Government. Their Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country. Nor are their Lordships deciding any question as to the rights of women but only a question as to their eligibility for a particular position. No one, either male or female, has a right to be summoned to the Senate. The real point at issue is whether the Governor General has a right to summon women to the Senate.

The Act consists of a number of separate heads.

The preamble states that the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the united Kingdom.

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(1) (1888) 14 App. Cas. 46, 50.

(2) [1895] A. C. 202, 216.

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Head No. 2 refers to the union.

Head No. 3, ss. 9 to 16, to the executive power.

It is in s. 11 that the word "persons," which is used repeatedly in the Act, occurs for the first time.

It provides that the persons who are members of the Privy Council shall be from time to time chosen and summoned by the Governor General.

The word "person," as above mentioned, may include members of both sexes, and to those who ask why the word should include females the obvious answer is why should it not? In these circumstances the burden is upon those who deny that the word includes women to make out their case.

Head No. 4 (ss. 17–20) deals first with the legislative power. Sect. 17 provides there shall be one Parliament for Canada consisting of the Queen, an upper house styled the Senate, and the House of Commons. Sects. 21–36 deal with the creation, constitution and powers of the Senate. They are the all important sections to consider in the present case, and their Lordships return to them after briefly setting out the remaining sections of the Act.

Sects. 37–57 deal with the creation, constitution and powers of the House of Commons with special reference to Ontario, Quebec, Nova Scotia and New Brunswick, which were the first Provinces to come in under the scheme, although power was given under s. 146 for other Provinces to come in, which other Provinces have availed themselves of.

Head No. 5 (ss. 58–90) deals with the Provincial constitutions, and defines both their executive and legislative powers; head No. 6 (ss. 91–95) deals with the distribution of legislative powers; head No. 7 (ss. 96–101) deals with the judicature; head No. 8 (ss. 102–126) deals with revenues, debts, assets and taxation; head No. 9 (ss. 127–144) deals with miscellaneous provisions; head No. 10 (s. 145) deals with the intercolonial railway; and head No. 11 (ss. 146, 147) deals with the admission of other colonies.

Such being the general analysis of the Act, their Lordships turn to the special sections dealing with the Senate.

It will be observed that s. 21 provides that the Senate shall consist of seventy-two members, who shall be styled senators. The word "member" is not in ordinary English confined to male persons. Sect. 24 provides that the Governor General shall summon qualified persons to the Senate.

As already pointed out, "persons" is not confined to members of the male sex, but what effect does the adjective "qualified" before the word "persons" have?

In their Lordships' view it refers back to the previous section, which contains the qualifications of a senator. Sub-ss. 2 and 3 appear to have given difficulties to the Supreme Court. Sub-s. 2 provides that the qualification of a senator shall be that he shall be either a natural born subject of the Queen, naturalized by an Act of Parliament of Great Britain or of one of the Provincial Legislatures before the union or of the Parliament of Canada after the union. The Chief Justice in dealing with this says that it does not include those who become subjects by marriage, a provision which one would have looked for had it been intended to include women as being eligible.

The attention of the Chief Justice, however, was not called to the Aliens Act, 1844 (7 & 8 Vict. c. 66), s. 16 of which provides that any woman married or who shall be married to a natural born subject or person naturalized shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural born subject. The Chief Justice assumed that by common law a wife took her husband's nationality on marriage, but by virtue of that section any woman who marries a natural born or naturalized British subject was deemed and taken to be herself naturalized. Accordingly, s. 23, sub-s. 2, uses language apt to cover the case of those who become British subjects by marriage.

Their Lordships agree with Duff J. when he says: "I attach no importance to the use of the masculine personal pronoun in s. 23, and, indeed, very little importance to the provision in s. 23 with regard to nationality," and refer to s. 1 of the Interpretation Act, 1889, which in s. 1, sub-s. 2, provides that words importing the masculine gender shall include females.

The reasoning of the Chief Justice would compel their Lordships to hold that the word " persons " as used in s. 11 relating to the constitution of the Privy Council for Canada was limited to " male persons," with the resultant anomaly that a woman might be elected a member of the House of Commons but could not even then be summoned by the Governor General as a member of the Privy Council.

Sub-s. 3 of s. 23 provided that the qualification of a senator shall be that he is legally and equitably seised of a freehold for his own use and benefit of lands and tenements of a certain value. This section gave some trouble to Duff J., who says that sub-section points to the exclusion of married women, and would have been expressed in a different way if the presence of married women had been contemplated. Their Lordships think that this difficulty is removed by a consideration of the rights of a woman under the Married Women's Property Acts. A married woman can possess the property qualification required by this sub-section. Apart from statute a married woman could be equitably seized of freehold property for her own use only, and by an Act respecting certain separate rights of property of married women, consolidated statutes of Upper Canada, cap. 73, s. 1, it was provided: " Every woman who has married since May 4, 1859, or who marries after this Act takes effect, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real and personal property . . . . in as full and ample a matter as if she continued sole and unmarried. . . . ."

Their Lordships do not think it possible to interpret the word " persons " by speculating whether the framer of the British North America Act purposely followed the system of Legislative Councils enacted in the Acts of 1791 and 1840 rather than that which prevailed in the maritime Province for the model on which the Senate was to be formed, neither do they think that either of these sub-sections is sufficient to rebut the presumption that the word " persons " includes women. Looking at the sections which deal with the Senate as a whole (ss. 21–36) their Lordships are unable to say that there is anything in those sections themselves upon which the Court could come to a definite conclusion that women are to be excluded from the Senate.

So far with regard to the sections dealing especially with the Senate—are there any other sections in the Act which shed light upon the meaning of the word " persons " ?

Their Lordships think that there are. For example, s. 41 refers to the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly, and by a proviso it is said that until the Parliament of Canada otherwise provides at any election for a member of the House of Commons for the district of Algoma in addition to persons qualified by the law of the Province of Canada to vote every male British subject aged twenty-one or upwards being a householder shall have a vote. This section shows a distinction between " persons " and " males." If persons excluded females it would only have been necessary to say every person who is a British subject aged twenty-one years or upwards shall have a vote.

Again in s. 84, referring to Ontario and Quebec, a similar proviso is found stating that every male British subject in contradistinction to " person " shall have a vote.

Again in s. 133 it is provided that either the English or the French language may be used by any person or in any pleadings in or issuing from any court of Canada established under this Act and in or from all of any of the courts of Quebec. The word " person " there must include females, as it can hardly have been supposed that a man might use either the English or the French language but a woman might not.

If Parliament had intended to limit the word " persons " in s. 24 to male persons it would surely have manifested such intention by an express limitation, as it has done in ss. 41 and 84. The fact that certain qualifications are set out in s. 23 is not an argument in favour of further limiting the class, but is an argument to the contrary, because it must be presumed that Parliament has set out in s. 23 all the qualifications deemed necessary for a senator, and it does not state that one of the qualifications is that he must be a member of the male sex.

Finally, with regard to s. 33, which provides that if any question arises respecting the qualifications of a senator or a vacancy in the Senate the same shall be heard and determined by the Senate that section must be supplemented by s. 1 of the Parliament of Canada Act, 1875, and by s. 4 of c. 10 of R. S. Can., and their Lordships agree with Duff J. when he says, " as yet, no concrete case has arisen to which the jurisdiction of the Senate could attach. We are asked for advice on the general question, and that, I think, we are bound to give. It has, of course, only the force of an advisory opinion. The existence of this jurisdiction of the Senate does not, I think, affect the question of substance. We must assume that the Senate would decide in accordance with the law."

The history of these sections and their interpretation in Canada is not without interest and significance.

From confederation to date both the Dominion Parliament and the Provincial legislatures have interpreted the word " persons " in ss. 41 and 84 of the British North America Act as including female persons, and have legislated either for the inclusion or exclusion of women from the class of persons entitled to vote and to sit in the Parliament and Legislature respectively, and this interpretation has never been questioned.

From confederation up to 1916 women were excluded from the class of persons entitled to vote in both Federal and Provincial elections. From 1916 to 1922 various Dominion and Provincial Acts were passed to admit women to the franchise and to the right to sit as members in both Dominion and Provincial legislative bodies. At the present time women are entitled to vote and to be candidates : (1.) At all Dominion elections on the same basis as men. (2.) At all Provincial elections save in the Province of Quebec.

From the date of the enactment of the Interpretation Acts in the Province of Canada, Nova Scotia and New Brunswick prior to confederation and in the Dominion of Canada since confederation and until the franchise was extended, women have been excluded by express enactment from the right to vote.

Neither is it without interest to record that when upon May 20, 1867, the Representation of the People Bill came before a Committee of the House of Commons, John Stuart Mill moved an amendment to secure women's suffrage, and the amendment proposed was to leave out the word " man " in order to insert the word " person " instead thereof: see Hansard, 3rd series, vol. clxxxvii., col. 817.

A heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court, and this Board will only set aside such a decision after convincing argument and anxious consideration, but having regard: (1.) To the object of the Act—namely, to provide a constitution for Canada, a responsible and developing State; (2.) that the word " person " is ambiguous, and may include members of either sex; (3.) that there are sections in the Act above referred to which show that in some cases the word " person " must include females; (4.) that in some sections the words " male persons " are expressly used when it is desired to confine the matter in issue to males; and (5.) to the provisions of the Interpretation Act; their Lordships have come to the conclusion that the word " persons " in s. 24 includes members both of the male and female sex, and that, therefore, the question propounded by the Governor General should be answered in the affirmative, and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly.

Solicitors for appellants and for Attorney-General for Quebec: *Blake & Redden.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1929 Oct. 31,

ROYAL TRUST COMPANY . . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR ALBERTA . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Canada—Succession Duty—Specialty—Debt due from the Crown—Debt arising under Statute—Bona notabilia—Bonds issued by Canadian Government—Succession Duties Act (R. S. Alta., 1922, c. 28), s. 7.

Debts due from the Crown, and debts arising under statute, are specialties; consequently, bonds not under seal but issued by the Government of Canada under Dominion statutory authority, and bearing the signature of the Deputy Minister of Finance, are for purposes of succession bona notabilia, and locally situate in the Province in which they are at the death of the holder.

Cork and Bandon Ry. Co. v. *Goode* (1853) 13 C. B. 826 approved.

Judgment of the Supreme Court of Alberta affirmed.

APPEAL (No. 39 of 1929) from a judgment of the Appellate Division of the Supreme Court of Alberta, dated March 13, 1929, upon a case stated for the opinion of the Court.

The question of law referred was whether certain Dominion Government bonds, issued under the War Appropriation Acts, 1915 to 1918, which formed part of the estate of W. R. Hull, were liable to succession duty under the Succession Duties Act, R. S. Alta., 1922, c. 28. The deceased died domiciled in Alberta, and the bonds were in his possession there at the time of his death.

The material facts appearing in the special case and the terms of s. 7 of the above Act are stated in the judgment of the Judicial Committee.

By a judgment delivered by Hyndman J., and concurred in by the other members of the Appellate Division, the question referred was answered in the affirmative. The learned judges held that the bonds, whether under seal or not, were specialties, and accordingly were legally situate at the death of the deceased where they were then found; further, that they were then situate in Alberta also because the holder could effectually transfer them, or obtain payment at Calgary.

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* *Present:* LORD SANKEY L.C., LORD DARLING, LORD MERRIVALE, LORD TOMLIN, and SIR LANCELOT SANDERSON.

1929. July 18, 22. *Hon. Geoffrey Lawrence K.C.* (with him *H. G. Nolan*) for the appellant. The bonds were not property "situate within the Province," and consequently were not liable to duty under s. 7 of the Act. The situation in law of intangible chattels is the place where they can be effectually dealt with: *Brassard* v. *Smith* (1); that rule applies to a Government security: *Attorney-General* v. *Bouwens.* (2) The only place at which the bonds could be dealt with effectually was Ottawa, where the register was kept. The branch offices at Calgary and elsewhere merely provided machinery for effecting transfers at Ottawa. So far as the bonds could be dealt with through Calgary that did not affect their situs, as movable property can have only one situs: *Toronto General Trusts Corporation* v. *The King.* (3) The bonds not being under seal were not specialties so as to localize their situation on the principle laid down in *Commissioner of Stamps* v. *Hope.* (4) It was not stated in that case that a debt arising under statute was a specialty for the present purpose. The decision in *Cork and Bandon Ry. Co.* v. *Goode* (5) related merely to the period of limitation. The Supreme Court rightly held that as the duty was imposed only upon property within the Province, the principle mobilia sequuntur personam did not apply. [Reference was made also to *Brassard* v. *Toronto General Trusts Corporation.* (6)]

Macmillan K.C. (with him *Lymburn, A.-G. for Alberta*) and *Frank Gahan* for the respondent. The bonds were issued under the authority of the War Appropriation Acts, and that was stated upon their face. They were therefore specialties: *Cork and Bandon Ry. Co.* v. *Goode* (5); there is no ground for

(1) [1925] A. C. 371.
(2) (1838) 4 M. & W. 171.
(3) [1919] A. C. 679 684.
(4) [1891] A. C. 476, 481.
(5) 13 C. B. 826.
(6) (1928) Q. R. 66 S. C. 472.

confining that decision to the question of limitation. The bonds were specialties also because they evidenced debts due from the King as represented by the Government of Canada: Wentworth on the Office of Executors, 1763, pp. 45, 46; Williams on Executors, 1st ed., p. 176. Being therefore specialty debts they were localized where the bonds were—namely, at Calgary: *Commissioner of Stamps* v. *Hope.* (1) The case of stocks and shares issued by a company is distinguishable; they are issued under the general statutory powers of the company to contract, whereas these bonds were issued under statutes the sole effect of which was to authorize their issue. But even if the bonds were not specialties and therefore bona notabilia, their situs was at Calgary. The situation of a simple contract debt is ordinarily where the debtor is; but it may be fixed by the contract itself, as in *New York Life Insurance Co.* v. *Public Trustee* (2), or by the course of business in relation to it, as in *Brassard* v. *Smith.* (3) In the present case the terms of the contract localized the debt at Calgary. The bonds were marked as registered at Calgary; they were payable and transferable upon being presented there. The bonds being Dominion securities the intention cannot have been that all the bonds issued should have a situs for purposes of succession at Ottawa in the Province of Ontario. The case differs from that of a foreign Government bond, which was dealt with in *Attorney-General* v. *Bouwens.* (4)

Hon. Geoffrey Lawrence K.C. replied.

Oct. 31. The judgment of their Lordships was delivered by

LORD MERRIVALE. The question for determination in this case is whether certain bonds of the Dominion of Canada, of which at the time of his death William Roper Hull, late of the City of Calgary, was owner, are within the meaning of the Succession Duties Act (R. S. of Alberta, 1922) property of his, passing on his death, which was at the time of his death "situate within the Province," and subject therefore to the duties prescribed by the statute.

(1) [1891] A. C. 476, 481.
(2) [1924] 2 Ch. 101.
(3) [1925] A. C. 371.
(4) 4 M. & W. 171.

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The Supreme Court of Alberta held the bonds to be subject to duty. The executors of the deceased appeal against that decision.

The bonds in question are securities which were issued by the Dominion Government under the authority of War Appropriation Acts of 1915, 1916 and 1917. They secure payment of $641,000: $330,000 in 1933 and $311,000 in 1937.

Each of the bonds maturing in 1933 provides that the Government will pay to "William Roper Hull or registered assigns" the capital sum of $5000 and will pay interest thereon at the agreed rate half-yearly. "Such principal sum," the bond states, "is payable at the office of the Minister of Finance and Receiver-General at Ottawa or at the office of the Assistant Receiver-General at . . . ."—among other named places Calgary. The interest is made payable free of exchange at any branch in Canada of any chartered bank. The statutory authority for the issue and the terms thereof are set forth on the face of the security, and this statement is made: "This bond is issued under the authority of Statutes of Canada," specifying the War Appropriation Acts, 1915, 1916, 1917 and 1918. Following the statement of the issue and its terms is the attestation of due execution—"In witness whereof the Dominion of Canada has caused the engraved facsimile signature of the Deputy Minister of Finance to be placed hereon and the bond to be duly countersigned. Dated at Calgary, Alberta, January 10, 1922." The facsimile signature follows. The bond is countersigned, as its terms require, and it purports to be registered at the office of the Assistant Receiver-General, Calgary.

Indorsed upon each of the bonds maturing in 1933 are conditions whereby the bond is made transferable at the office of the Minister of Finance and Receiver-General at Ottawa upon presentation for the purpose, accompanied by a written instrument of transfer, and whereunder also transfer may be effected at, among other places, Calgary.

The bonds maturing in 1937 vary a little from those maturing in 1933. The provisions as to transfer and payment are formulated differently. Each bond for 1937 is made transferable at the office of the Minister of Finance and Receiver-General. By an indorsement the principal sum secured is declared to be payable at the office of the Receiver-General, Ottawa, or the Assistant Receiver-General at various Provincial capitals, including Calgary, and the interest at any branch of any chartered bank in Canada; and the bonds are declared to be transferable upon presentation with a written instrument in due form at the office of the Minister of Finance and Receiver-General at Ottawa or "at . . . . Calgary. . . . ." Condition 8 of the indorsement of the bond states that:—

"An office of the Assistant Receiver-General of the Dominion of Canada is maintained at the City of Calgary . . . . and when holders . . . . desire to effect transfer . . . . the procedure is as follows: Registered bonds accompanied by the proper form of transfer executed by the registered holder, or in the case of the death of the registered holder, by his duly-appointed personal representative, are received by the Assistant Receiver-General at Calgary. . . . . The grant of probate or administration to the personal representative signing the transfer may be a grant issued by a Court in any Province where the deceased owned property. The bonds are then marked 'cancelled' by the Assistant Receiver-General and forwarded by him to the Department of Finance at Ottawa, with instructions in accordance with the written request of the owner as aforesaid. If registered bonds are required, the new bonds are issued and registered at Ottawa and the stamp, 'registered at the office of the Assistant Receiver-General, Calgary,' is placed on the bonds at Ottawa before such bonds are forwarded to the office of the Assistant Receiver-General at Calgary for delivery to the person entitled thereto. Dividend cheques are mailed to the registered owner from the Department of Finance at Ottawa, where records of ownership are kept, and the transfer of fully registered bonds may be effected only at Ottawa. If bearer bonds are required, they are issued at Ottawa and forwarded to Calgary in the same manner as registered bonds. A card record is kept at the office of the Assistant Receiver-General at Calgary, showing the numbers of the bonds forwarded to and received from Ottawa, the origination of the request for registration or exchange for bearer bonds and the action taken on such request. No other records are kept at the office of the Assistant Receiver-General at Calgary."

The case was argued here, as in Alberta, on an agreed statement of facts, upon which the question submitted for the opinion of the Court is "Whether or not succession duties are assessable by the Province of Alberta, with respect to said bonds." The material section of the Provincial statute provides (c. 28, s. 7) that "all property of the owner thereof situate within the Province and passing on the death shall be subject to succession duties." The decisive question between the parties was and is, therefore, were the bonds in question property of the testator, Mr. Hull, situate within the Province, and passing on his death ? They undoubtedly passed on his death ; were they "situate within the Province" ?

The Appellate Division held that, having regard to the form and terms of the bonds, they must be included among obligations classed in law as "specialties" which have their situation in point of liability to taxation where they are found in the possession of the testator at his death, and that, though not under seal, they have the character of specialty by reason of the statutory liability which they established. The Court considered also that if the liability witnessed by the bonds were no more than a chose in action, nevertheless—as everything requisite to be done to effect a transfer or to obtain payment of moneys due could be effectually done in Alberta—apart from the law as to specialties the bonds constitute property situate in Alberta. These conclusions the appellants challenge, mainly upon two broad grounds, that the bonds not being securities under seal cannot rightly be regarded as specialties, so as to secure for them a peculiar local situation, and that as personal obligations their situation—"situs"—is to be determined by ascertaining the place where they can be effectively dealt with. The register of bondholders being at Ottawa and title having to be completed by registration, the bonds, it is said, are legally situate in the Province of Ontario.

The local situation proper to be attributed to the various assets of a deceased person has long been governed under our law by rules, no doubt somewhat artificial in character, which were evolved when the lawful jurisdiction to direct the administration of such assets depended upon the locality in which the assets were found. Many of the Courts concerned had authority within small Provincial areas only. A simple contract debt due from a debtor resident outside the jurisdiction within which the testator resided was not assets within that jurisdiction. As is held in the judgment of Lord Abinger in *Attorney-General* v. *Bouwens* (1), such debts are assets where the debtor resides. A debt under seal, or specialty, was held to have a species of corporeal existence by which its locality might be reduced to a certainty. Such debts were called by the civilians bona notabilia. Wentworth, a very old authority in regard to such matters, sets forth the distinction (Wentworth on the Office of Executors, 1763 ed., pp. 45, 46), and specifies some of the obligations which were classed as bona notabilia—e.g., a bond and "a debt due from the King"—and says succinctly, "These debts shall be said to be where the bonds or other specialties be." Sir Edward Vaughan Williams reaffirms Wentworth as to debts of the Sovereign: Williams on Executors, 1st ed., p. 176. A passage from the opinion of Lord Field in *Commissioner of Stamps* v. *Hope* (2) states in simple terms the grounds of what Lord Field calls the "well-settled rule" that "a debt does possess an attribute of locality," and says "the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty." What is excluded from "locality" within a limited jurisdiction is a personal claim not there enforceable. What is "specialty" is a larger subject.

Were the bonds in question, then, debts by specialty? They were not under seal; but that does not conclude the matter. The sign manual and—far less immediate than that—the signature of an officer of State, or of the Household, must have sufficiently evidenced what Wentworth calls "a debt due from the King." Here we have an instrument certain in itself—an obligation of the sovereign authority of the Dominion authenticated in the manner prescribed by the Legislature. Each bond is, moreover, a statutory obligation, and so long ago as 1853 the Court of Common Pleas in England held: *Cork and Bandon Ry. Co.* v. *Goode* (1) that a debt arising under a statute is not a simple contract debt with a six years' period of limitation of liability, but by reason of its statutory origin a debt by specialty subject only to the period of limitation appropriate to specialties. "A declaration in debt upon a statute," it was said, "is a declaration upon a specialty."

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(1) 4 M. & W. 171, 190.

(2) [1891] A. C. 476, 481, 482.

In their Lordships' opinion the statutory obligations of the Dominion of Canada evidenced by the bonds here in question are specialties, and at the time of the testator's death had their local situation at his place of residence in Alberta.

It is unnecessary to consider at length the question whether —apart from the law as to specialty—these bonds as contractual liabilities of the Dominion Government had a local situation in Alberta. The view that they had, which is declared in the judgments of the Appellate Division, was not in the opinion of their Lordships who have heard the case here, is displaced by the argument made on behalf of the appellants. It was sought to liken the bonds to the shares of a joint stock company so as to apply the principle affirmed in *Brassard* v. *Smith* (2), that in the case of such shares the test of local situation is supplied by the question, "Where could the shares be effectively dealt with?" But these securities were statutory bonds and not shares. The conditions of the bonds as to registration are in no way analogous to the provisions in articles of association for the incorporation of shareholders in a joint stock company by the entry of their names on the register of shareholders at its authorized place

(1) 13 C. B. 826, 835.

(2) [1925] A. C. 371, 373, 376.

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of being. The fact that payment may be claimed in any other Province, as well as in Alberta, does not, as was suggested, neutralize the effect of the undertaking in the bond to make payment in Alberta if payment there be required. It is unnecessary, however, to deal at length with the aspect of the case upon which these considerations arise.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1929 Oct. 15.

D. E. LECAVALIER . . . . APPELLANT;

AND

CITY OF MONTREAL . . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, PROVINCE OF QUEBEC.

Canada (Quebec)—Action for Nuisance on Land—Absence of Title in Plaintiff—Unregistered Conveyance and Deed of Retrocession—Garantie légale—Alleged Expropriation—Civil Code, arts. 1507, 1508.

In 1923 the appellant brought an action against the respondent city for an injunction and damages, alleging that they had created a continuing nuisance on his land by the discharge of sewage. Among other pleas the respondents put the appellant's title in issue. In 1920 the appellant had sold the land to a company for shares with a garantie légale, and conveyed it to the company by deed. In 1922 the directors of the company passed resolutions which purported to rescind the conveyance and authorized the execution of a deed of retrocession. There was no evidence of a contract between the company and the appellant to give and accept a retrocession. The deed of retrocession was not executed until 1924. It acknowledged the return of the shares, and provided that the deed should take effect from the date of the resolutions, but that provision followed one stating that the appellant was to enjoy the land in full ownership from the date of the deed. Neither the conveyance nor the deed of retrocession was registered. Any claim to damages which accrued before

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* *Present:* LORD SANKEY L.C., LORD DARLING, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, and LORD THANKERTON.

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the date of the conveyance was barred by limitation. By amendment at the trial the appellant claimed on the basis of an illegal expropriation of the land:—

Held, that the appellant could not maintain the action, because when it was commenced he had no legal or equitable title to the land, nor had he an interest in respect of a liability to the company under his garantie légale, as by the Civil Code arts. 1507, 1508, his liability thereunder did not extend to the wrongful acts of others; further, that the acts complained of being delictual could not support the alleged expropriation of the land.

Judgment of the Court of King's Bench affirmed.

APPEAL (No. 34 of 1929) from a judgment of the Court of King's Bench for the Province of Quebec, Appeal Side (dated January 14, 1929), reversing a judgment of the Superior Court.

The action was brought by the appellant against the respondent City on June 30, 1923, claiming an injunction and damages. The appellant alleged that the respondent city had committed a serious and continuing nuisance on certain land of which he was the owner by the deposit of sewage thereon. In the course of the trial the appellant amended, by leave of the Court, and claimed in the alternative on the basis of an illegal expropriation of the land by the respondent City.

On the basis of the alternative claim the trial judge awarded the appellant damages; upon appeal the decision was reversed and the action dismissed.

The facts are stated in the judgment of the Judicial Committee.

1929. July 1, 2, 4, 5. *Hon. Geoffrey Lawrence K.C.* and *Germain K.C.* for the appellant.

Geoffrion K.C. and *St. Pierre K.C.* for the respondents.

Oct. 15. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. This is an appeal from a judgment dated January 14, 1929, of the Court of King's Bench (Appeal Side) for the Province of Quebec, whereby that Court reversed a judgment dated March 10, 1927, of the Superior Court of Quebec in favour of the appellant and dismissed his action with costs.

The action was commenced on June 30, 1923, the appellant being the plaintiff and the City of Montreal being the defendants.

The plaintiff alleged that he was the owner (propriétaire) of certain lands lying to the north of the city and bounded on the north by the Rivière des Prairies. These lands were intersected by a watercourse called the Ruisseau-Raimbault, which eventually flowed into the Rivière des Prairies. The appellant complained in effect that the city had used this watercourse as a common sewer, discharging into it quantities of foul and other noxious substances, thereby occasioning a very serious nuisance to the appellant, and he claimed an injunction and damages, alleging loss of revenue from the lands and a diminution of their value.

He afterwards, on December 18, 1925, by leave of the Court, delivered an amended statement of claim, whereby he alleged that the conduct of the respondents amounted in effect to an expropriation of the land, and claimed, as an alternative to an injunction, the actual value of the land, offering, in the event of such claim being allowed, to convey the lands to the respondents.

By his judgment the learned trial judge, Duclos J., declined to grant an injunction, but allowed the alternative claim of the appellant, assessed the value of the land at $90,000, and awarded this sum, with twelve years' interest at 5 per cent., amounting altogether to $144,000, to be paid by the respondents to the appellant, with interest from the date of the judgment, with costs, and declared that on payment of principal, interest and costs the registration of the judgment should confer title on the respondents.

It ought to be mentioned that in the meantime the appellant had obtained an interim injunction restraining the continuance of the nuisance complained of. This injunction was not obeyed, and on three several occasions the respondents were fined $500, $500 and $2000 respectively, payable to the Crown for non-compliance therewith. It does not appear whether the payment of these fines was enforced.

The existence of a serious nuisance was established at the trial and is not in issue, but the respondents contended and repeated their contention before the Board, that the action was unfounded, for the following reasons: (1.) That the allegation on the part of the plaintiff that on June 30, 1923, the date of the commencement of the action, he was the owner of the land in question, was shown by his own evidence to be and was in fact untrue, and that he had no other interest sufficient to support an action. (2.) That there was no foundation in fact or in law for the claim that the conduct of the respondents amounted to an expropriation, and that the appellant was entitled to recover the value of the land. (3.) That inasmuch as on September 20, 1920, the appellant had sold the land and had ceased to be the owner thereof, he could not recover any damages for loss of revenue since that date, and any claim to damages on that head for a period prior to that date was barred by prescription, the period of which for damages for a tort (quasi délit) being fixed by the Code Civil at two years.

These grounds of defence were accepted by the Appellate Court, with the result stated above, and their Lordships proceed to consider them in their order.

(1.) The appellant by his statement of claim alleged that he was the owner (propriétaire) of the land. This was met by a plea which, it is agreed, amounts to a plea of non-admission according to our practice, and leaves upon the appellant the burden of proving his title. In his examination in chief the appellant proved that the land had been conveyed to him in 1912 and the conveyance had been duly registered. So far, therefore, he had proved his title, but it came out, accidentally to all appearance, in the course of cross-examination, that this was not the whole story, but that on September 20, 1920, he had sold and conveyed the property to a company called the Luna Park Company, Ld., by whom, on July 6, 1924, more than a year after the commencement of the action, it had been reconveyed to him. It is true that neither of these documents had been registered, but their Lordships agree with the judges of the

Appellate Court that though this fact would have given priority to a third person claiming under a registered deed, it has no bearing on the question now to be determined.

The appellant at the outset attempted to meet this point by contending that the objection founded on the conveyance to the Luna Park Company could not, on the pleadings, be admitted, as it had not been specifically raised by the respondents. Their Lordships can find no support for this contention. The conveyance in question was part of the title of the appellant. It was, in fact, produced by him though the fact of its existence was only elicited in cross-examination. It was incumbent upon the appellant to prove his title, not on the respondents to disprove it, and there is no ground for the suggestion that the objection should have been raised by the respondents who, so far as appears, did not know of the existence of the conveyance until that fact was disclosed by the appellant.

A more serious contention, and one that requires careful consideration, was : (*a*) that the conveyance of September 20, 1920, was not, and was never intended, to be operative as a transfer of the property ; or (*b*) that if it was ever operative at all, it ceased to be so as from the date November 12, 1922, of a certain resolution of the board of directors of the Luna Company ; or (*c*) that at all events as from that date the appellant became entitled to call for a transfer of the property, and so ought to be treated as the owner in equity.

As to (*a*), the deed in question was formally executed before a notary, nothing remaining to be done to render it an effectual transfer of the property as between the parties to it. The property was sold " avec la garantie légale." As to possession it was provided that the purchaser should enjoy and dispose of the land in full and absolute ownership from the date of the deed, and should take possession of it immediately. The price was to be paid in certain shares of the company which the vendor acknowledged to have received from the purchaser on the day of the date of the deed.

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In their Lordships' opinion it would be impossible, especially in the absence of the Luna Park Company, who are not parties to the action—to come to the conclusion that the deed in question was not intended to operate according to its terms. But in truth the documentary evidence adduced by the appellant in support of his contention on this point is fatal to it. It consists of two documents, first, a resolution of the board of directors of the company, dated November 12, 1922; and secondly, of a deed of retrocession in favour of the appellant dated July 6, 1924. The resolution is contained in the minutes of the board under date November 12, 1922. There is no evidence that the appellant was present. The minutes recite that "il n'a pas été donné suite au contrat d'achat" there described, being in fact the deed in question. They then state the difficulty the company had met with in disposing of their property and their shares, and in the exploitation of the park owing to the action of the respondents and the nuisance occasioned thereby. The sixth recital is as follows: "Considérant que la Compagnie Luna Park se trouve (1) dans l'impossibilité d'utiliser ces dites propriétés pour des fins qu'elle se proposait est obligée de faire un acte de rétrocession."

There solutions follow. The first is immaterial; the second purports to rescind and declare null in law the authority inscribed in the minutes of July 2, 1920, to the president and secretary to sign the deed in question. The third is immaterial. The fourth is as follows: "Q'un acte de rétrocession soit fait par la dite compagnie au Dr. E. Lecavalier (the appellant) et que le président et la secrétaire-trésorier soient autorisés à le signer."

By these minutes the company recognizes that there was an effective purchase, and that for the reasons expressed it is obliged to make a retrocession of the property, and resolve that such retrocession be made. In the face of this it is obviously impossible to hold that there was no sael at all.

The deed of retrocession was not executed for nearly two years after the date of the resolution—namely, on July 6,

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(1) [This should be "trouvant" to make the sentence grammatical.—F. P.]

1924. By that deed, which was also signed before a notary, the company, for reasons mentioned in the above resolution, retrocedes to the appellant, who was present and accepted the retrocession, the property in question. As to the company's title it states that the property had been acquired under the deed above mentioned. As to possession it provides that the appellant shall enjoy and dispose of the land in full and absolute ownership as from the day of the date of the deed, "les présentes prenant effet du 12 Novembre, 1922," the date of the resolution. What possible effect these last words can have it is difficult to see, for they appear to be plainly inconsistent with those immediately preceding. Finally, the retrocession is said to have been made for the same price which the vendor retroceding acknowledges to have received on the day of the date of the deed from the appellant in shares of the company, the details of which are given.

On these facts their Lordships cannot avoid the conclusion that the decision of the Appellate Court was right on this point, and that the appellant having sold and conveyed the property to the company on September 20, 1920, was not the owner thereof on June 30, 1923, the day of the commencement of the action.

But the appellant contends ((*b*) mentioned above) that as from the date of the resolution the deed of retrocession conferred the ownership upon him. This has in reality been already dealt with in discussing the terms of the deed of retrocession. No authority was cited to the effect that such a deed could have a retro-active effect as regards the transfer of the property, and, in fact, as already pointed out, the provision purporting so to provide is contradictory to the words immediately preceding it and to the terms of the conveyance itself. In their Lordships' opinion this contention fails. As to (*c*), there is no evidence of any binding contract on the part of the company to give, or on that of the appellant to accept, a retrocession except that expressed in the deed itself, and there was therefore no right in the appellant to call for a conveyance prior to the date of that deed, and no equitable ownership on his part which

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might be such an interest as would under the Code be sufficient to support the action. If this be so, the Appellate Court was right in rejecting the appellant's claim to compensation for damage to the capital value of the land.

As to the ground of defence (2.), their Lordships are further of opinion that the judgment of the trial judge could not have been supported even if the appellant had satisfied them that he was in fact the owner. The trial judge proceeded on the theory that the action of the respondents amounted to an illegal expropriation of the land and awarded the entire value to be paid as compensation. With all respect to the trial judge, their Lordships on this point agree with the view of the Appeal Court, that in acting as it did the respondent City was a tortfeasor and nothing more, liable no doubt to pay damages in an action by a person entitled to complain of nuisance, but not liable to be compelled to take over and pay for the land as expropriators.

One further point was made by counsel for the appellant in his endeavour to establish his claim to an interest sufficient to support the action. He said, under the garantie légale, he was liable to the Luna Park Company for the injury to the land sold to them as a consequence of the acts of the respondents. But a reference to the Code Civil, arts. 1507 and 1508, makes it plain that under the garantie légale the vendor is liable only for the consequences of a right existing at the date of the sale. In the present case the acts from which injury to the land is said to have arisen are ex hypothesi illegal, and for such acts on the part of a third party the vendor who has sold under the garantie légale is under no liability to the purchaser.

There remains the question whether the appellant could recover anything in respect of the rents and profits of the land alleged to have been lost by reason of the nuisance caused by the respondents' acts. (Point 3 above mentioned.) For the period prior to June 30, 1921, two years before the issue of the writ, any such claim would clearly be barred by the provisions of the Code as to prescription. During the period succeeding that date and until after the commencement of the action the appellant was not the owner. He says he was in possession, but this statement is entirely unsupported. Not being owner, there is no presumption in his favour. The terms of the deed are against him. There is no evidence of any act on the part of the company giving him the right to receive the rents and profits, if there were any. If he had no right to receive the rents and profits he cannot recover damages for being prevented from so doing.

The result is that, in their Lordships' opinion, the order of the Appellate Court was right and the present action was properly dismissed. They, however, cannot but feel some regret at being compelled to arrive at this conclusion, for it has been held that the respondent City committed a serious nuisance, which is still continuing, and nothing in this judgment must be taken to prejudice a claim to appropriate relief in an action properly framed and at the suit of a plaintiff in a position to claim such relief. They have carefully considered the appeal of the appellant to their discretion as to costs, but they cannot see any sufficient reason for depriving the successful respondents thereof. The City does not appear to have been guilty of any such misconduct in the course of the defence as would be sufficient for this purpose. It is true that it was in contempt for disobedience to the interim injunction, but it has been ordered to pay the costs of the several applications consequent on such contempt and these orders have not been set aside.

On the whole their Lordships are of opinion that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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ERIE BEACH COMPANY, LIMITED . . APPELLANTS;

AND

ATTORNEY-GENERAL FOR ONTARIO . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Succession Duty—Shares in Ontario Company—Business conducted in United States—Situation of Shares—Liability of Company for Duty — Legislative Authority of Province — Succession Duty Act (R. S. Ont., 1914, *c.* 24), *ss.* 7, 10, *sub-s.* 2—*British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92, *head* 2.

The Succession Duty Act of Ontario provides by s. 7 that property situate in Ontario shall be subject to a succession duty; and by s. 10, sub-s. 2, that any corporation or person allowing a transfer of property which is subject to the duty before the duty has been paid or secured shall be liable to pay the duty.

The appellant company was incorporated under the Ontario Companies Act, and had its chief office in that Province. All its meetings, whether of shareholders or directors, were held at Buffalo, U.S.A.; the company's business was conducted from its office there; its books and records were kept, shares issued, and transfers made and recorded, at the office in Buffalo:—

Held (1.) that, as by the Ontario Companies Act the shares of the company could be effectually dealt with only in Ontario, shares of which a deceased person resident in the United States was the registered holder, and shares which he was entitled to have allotted under a contract with the company, were property situate in Ontario, and liable to duty under s. 7 of the Succession Duty Act; (2.) that s. 10, sub-s. 2, of the Act was not indirect taxation so as to be invalid under s. 92, head 2, of the British North America Act, 1867, as a company or person thereby made liable to pay the duty was not entitled to recoupment by anybody.

Brassard v. *Smith* [1925] A. C. 371 and *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* [1927] A. C. 934 applied.

Judgment of the Supreme Court of Ontario affirmed.

APPEAL (No. 41 of 1929) from a judgment of the Appellate Division of the Supreme Court of Ontario (January 14, 1929) reversing a judgment of Logie J. (December 30, 1927).

* *Present:* LORD SANKEY L.C., LORD DARLING, LORD MERRIVALE, LORD TOMLIN, and MR. JUSTICE DUFF.

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The appellant company brought an action against the respondent in the Supreme Court of Ontario, claiming on an agreed statement of facts that certain shares in the appellant company registered in the name of F. V. E. Bardol, deceased, and certain further shares in the company to an allotment of which he was entitled by contract with the company, were not subject to duty under the Ontario Succession Duty Act (R. S. Ont., 1914, c. 24); and that the company was not liable to pay the duty if it allowed a transfer of the shares to be made before the duty was paid.

The questions arising were: (1.) whether the shares in question were "property situate in Ontario," so as to be liable to duty under s. 7 of the above Act; and, if they were, (2.) whether s. 10 of Act (as amended by 15 Geo. 5, c. 13, s. 7), which provided that the company should be liable to pay the duty if it allowed a transfer of the shares before the duty was paid or secured, was ultra vires under the British North America Act, 1867.

The facts and the material provisions of the Succession Duty Act appear from the judgment of the Judicial Committee.

The trial judge (Logie J.) held that the shares were not liable to duty under the Act, and made the declaration prayed.

On appeal to the Appellate Division the decision was reversed, and the suit dismissed. The learned judges (Mulock C.J. and Magee, Hodgins, and Grant JJ.) held that the shares were property situate in Ontario, and that accordingly the duty was payable out of the estate; also, that s. 10 of the Act was intra vires. The appeal is reported at 63 Ont. L. R. 469.

1929. July 15, 16. *Tilley K.C.* and *Kingstone K.C.* for the appellants. Liability to the duty in respect of the issued shares, and in respect of the shares not allotted at the death of the deceased, should be considered separately. The issued shares were not property "situate in Ontario" within s. 7 of the Act. Although the head office of the company was in Ontario, its by-laws gave it authority to hold meetings of its shareholders and directors outside the Province and provided that transfers of shares could be recorded otherwise than at the head office. All the meetings of shareholders and of directors were held at Buffalo, in the United States, and the book recording transfers of shares was kept there. Upon a transfer being passed by the directors, and entered in the book, the transferee became entitled to a certificate. The certificate issued by a Canadian company is a certificate that the person named is owner of the shares, not that he is on the share register; not being on the register at the head office would not be conclusive against him. The Supreme Court, applying *Attorney-General* v. *Higgins* (1); *Brassard* v. *Smith* (2); and *In re Aschrott* (3) held that the situation of the shares was the place where they could be dealt with effectually; the Court was wrong in holding that that place was Ontario. Although the company was to be regarded as resident in Ontario it was domiciled in the United States, and the shares were in the possession of the deceased, who was there domiciled. With regard to the balance of the shares: they did not stand in the name of the deceased, nor were they held in trust for him; his rights in relation to them were contractual. The situation of that asset was the place for the performance of the contract by the allotment of the shares; that place was Buffalo. In any case there could be no liability on the company save under s. 10 of the Act, and that section was ultra vires the Provincial Legislature under the British North America Act, 1867, s. 92, head 2. Sub-s. 1 was ultra vires, because it made the situation of the head office the test, even if the shares were situate outside Ontario. Sub-s. 2 was ultra vires, because it was not direct taxation, in that it imposed liability for the duty upon persons other than those who it was intended should pay it: *Burland* v. *The King*. (4)

W. A. Greene K.C. and *A. W. Marquis K.C.* for the respondent. Under the authorities already referred to the issued shares were situate where they could be effectually dealt with; that was at the head office of the company in

(1) (1857) 2 H. & N. 339.
(2) [1925] A. C. 371.
(3) [1927] 1 Ch. 313, 320.
(4) [1922] 1 A. C. 215.

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Ontario. By the Ontario Companies Act, ss. 56, 57, 60, 118 and 119, the shares were transferable only in the book containing the names of the shareholders, which book had to be kept at the head office. A person not on that register was not a shareholder. The situation of the shares to be allotted was the place where they could effectually be reduced into possession; that, for the above reasons, was also the head office in Ontario. Sect. 10 of the Succession Duty Act is intra vires. The provision in sub-s. 2 is not an indirect tax. It is not a tax at all, but a penalty upon the company if it voluntarily breaks the law. It is not indirect, since a company made liable under the provision has no means of recovering the duty from the shareholder's estate. Mill's definition of direct and indirect taxes is merely a working rule; the substance of the impugned provision must be looked at: *Rex* v. *Caledonian Collieries.* (1)

Tilley K.C. in reply referred to *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (2)

Nov. 7. The judgment of their Lordships was delivered by

Lord Merrivale. The Erie Beach Company, Ld., appeals against the judgment of the Appellate Division of the Supreme Court in an action upon an agreed statement of facts wherein the company prayed a declaration that certain shares of its capital stock registered in the name of Frank V. E. Bardol, deceased, and other like shares allotable to him under a contract of his with the company were not upon his death subject to duty under the Ontario Succession Duty Act; a declaration that the company is not under s. 10 of the Act liable to pay duty in respect of a transfer of such shares permitted by the company before payment of succession duty thereon or security given for the payment of the same; and a declaration that s. 10 of the Act in so far as it purports to impose the last mentioned duty on the company is ultra vires of the Province of Ontario.

Frank V. E. Bardol was at all material times domiciled in the State of New York in the United States of America. The

(1) [1928] A. C. 358.

(2) [1927] A. C. 934.

plaintiff company is incorporated in Ontario under the Ontario Companies Act, 1914, having as its chief object the establishment, ownership and conduct of an amusement park upon a site at the village of Fort Erie on the Canadian shore of Lake Erie, within easy reach of the city of Buffalo. Mr. Bardol was apparently the person chiefly concerned in the undertaking. In consideration of assignments of property made by him to the company 9000 preferred and 1000 ordinary shares of $100 each therein, fully paid, were agreed to be issued to him; 100 of the ordinary shares were issued, 96 to him and 4 to nominees of his. The remainder were to be issued when and as he should direct, and remained unissued at his death in April, 1925. Probate of the will of Frank V. E. Bardol was granted in 1925 in the proper court in the State of New York. The plaintiff company in 1926 issued certificates for the testator's previously unissued shares, but was notified on behalf of the Attorney-General of Ontario that it would be held liable under the terms of the Provincial statutes if it should permit any transfer before succession duty had been paid or secured. Thereupon the company brought the present action. At first instance judgment was given in its favour, but the Appellate Division was unanimously of opinion against the several contentions raised by the plaintiffs. The Court held the shares to be subject to succession duty, the statute intra vires of the Provincial Legislature, and the contingent liability of the company under s. 10 to be well founded in law.

The Ontario Succession Duty Act (R. S. O., 1914, c. 24) by s. 7 imposes succession duty on "all property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere," and no question was raised but that this enactment, so far as s. 7 goes, is within the legislative powers of the Province as a measure of direct taxation within the terms of the British North America Act, 1867, s. 92. What was mainly in dispute upon the hearing at this Board was whether the shares in question were assets of the testator situate in Ontario. There was, however, the further question whether, in any view of the matter, s. 10 of the statute, imposing liability not upon succession to shares, but upon the corporation in which the shares exist, without the accrual of any successory interest in them to the company, is or is not indirect taxation and so beyond the legislative powers of the Province.

The material words of s. 10, as amended in 1925, are: "No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, whether such deceased person was at the time of his death domiciled in Ontario or elsewhere, shall be transferred . . . . until the duty, if any, is paid or security given therefor, and any corporation or person allowing such property to be so transferred . . . . contrary to this sub-section shall be liable for such duty."

The nature of the property in the shares in question depends in the main—if not wholly—upon the terms of the enactment under which the plaintiff company subsists: the Ontario Companies Act (R. S. Ont., 1914, c. 178). This statute of the Provincial Legislature provides for the grant of incorporation by the Lieutenant-Governor in Council, for purposes whereto the authority of the Legislature extends, to be set forth in the petition for incorporation. One of the antecedent requirements for incorporation is a statement by the petitioner or petitioners of a place in Ontario where the head office of the company is to be situate. The shares are by s. 56 to be deemed to be personal estate transferable on the books of the company. Under s. 60 no transfer is valid or effectual save as exhibiting the rights of the parties thereto toward each other until entry thereof is made in the books of the company. By-law 22 of the company provides, further, that the shares shall be transferable only by the recording of the transfer on the stock-book of the company at their head office or the office of their transfer agents, if any, and the company's authorized form of certificate states that the shares are transferable only on the books of corporation by the holder in person or his attorney upon surrender of the certificate properly indorsed. By s. 118 of the statute the company's register of shares and shareholders is required to be kept at its head office "within Ontario," and (by s. 119) available for inspection. There is provision in the statute—see ss. 52 and 119—for relaxation of the stringency of some relevant provisions by special Act, or letters patent, or by-laws, or leave of the Lieutenant-Governor, but no such special sanction exists in this case. By s. 121 of the statute jurisdiction is given to the Supreme Court of Ontario to order rectification of the books, and to determine questions of title in relation to the shares.

On the face of the statutory conditions above enumerated, it must be seen that if the corporation has a local habitation Ontario is its locality. For the appellants, however, facts are relied upon such as in the case of an individual might well have warranted an argument, that the person in question had chosen as his place of domicil the State of New York and had followed up his choice by action effectual to secure domicil there.

Frank V. E. Bardol and his associates in the organization of the company and the conduct of its affairs appear to have been all of them people of the State of New York. Every meeting of the company, whether of shareholders or of directors, took place in the City of Buffalo; the management of the company's business was conducted from its office in Buffalo; its books, records and documents were kept there; the common shares actually issued were issued there, and such transfers as took place were made and recorded there.

The appellants contended that shares in a joint stock company have no local situation, that, like debts and other choses in action and rights arising ex-contractu, they constitute property of which the value—applying the maxim "Mobilia sequuntur personam"—is taxable at the place of domicil of the deceased possessor. This view was adopted by Logie J. at the trial of the action.

A series of judicial decisions extending from *Attorney-General* v. *Higgins* (1), in the Court of Exchequer in 1857, to *Brassard* v. *Smith* (2), before this Board in 1924, have

(1) 2 H. & N. 339. (2) [1925] A. C. 371.

ascertained beyond possible doubt the test which must be applied to determine the local situation of the shares of a joint stock company when that fact has to be determined in order to decide as to liability to or immunity from local taxation. *Cotton* v. *The King* (1) and *Burland* v. *The King* (2), which were much discussed in the argument here, show the working of the rule, but do not qualify it as previously laid down.

In *Attorney-General* v. *Higgins* (3), as in *Brassard* v. *Smith* (4), duty upon shares was in question. In *Attorney-General* v. *Higgins* (3) Baron Martin held that when transfer of shares in a company must be effected by a change in the register, the place where the register is required by law to be kept determines the locality of the shares. Lord Dunedin, in delivering the judgment of this Board in *Brassard* v. *Smith*, epitomized the crucial inquiry in a sentence—"Where could the shares be effectually dealt with?" The circumstances relied upon by the appellants which show the predilection of the members of the plaintiff company for transacting its business in Buffalo—so far as they might—have, in their Lordships' opinion, no material weight. The shares in question can be effectually dealt with in Ontario only. They are therefore property situate in Ontario and subject to succession duty there.

The remaining question in the case is whether the liability purported to be created by s. 10, sub-s. 2, of the statute in question is of such a nature as to render the sub-section null as being made without authority; that is to say, as exceeding the power of the Provincial Legislature under the British North America Act, 1867, s. 92, to make laws in relation to direct taxation within the Province. On behalf of the appellants it was contended that the statute, in so far as it purports to create a liability in the plaintiff company, does not in truth impose succession duty on the company, but lays a tax upon persons not concerned in the succession in question in the expectation and with the intention that they shall indemnify themselves at the expense of those actually

(1) [1914] A. C. 176.
(2) [1922] 1 A. C. 215.
(3) 2 H. & N. 339.
(4) [1925] A. C. 371.

interested in the succession. "A direct tax," it was said on undoubted authority, "is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and the intention that he shall indemnify himself at the expense of another." The practical distinction between direct and indirect taxation formulated by John Stuart Mill in his Political Economy is, as was pointed out in *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1), "not a legal definition," but "a fair basis for testing the character of the tax in question." The question to be answered in the present case is not much helped by considering whether the impost effected by s. 10, sub-s. 2, resembles more nearly stamp duties such as were held in *Attorney-General for Quebec* v. *Reed* (2), to be a form of indirect taxation, or duties on licences, which in *Bank of Toronto* v. *Lambe* (3) were found to be direct taxes, or indeed by examination of various other cases to which their Lordships were referred. It is in truth this—Is the intention of s. 10, sub-s. 2, that when a corporation allows property of a deceased person to be transferred without provision previously made for succession duty, the corporation shall incur a liability beginning and ending with itself and answerable so far as legal liability goes out of its corporate funds alone, or does the section intend that the corporation shall pay the succession duty on behalf of the persons concerned, and by so doing become entitled to recover from such persons the amount paid?

The answer to the question so stated must be determined by the terms of the statute. Sect. 10, sub-s. 2, it will be seen, does two things. It enacts a prohibition in the words following: "No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, whether such deceased person was at the time of his death domiciled in Ontario or elsewhere, shall be transferred, paid or given to the person entitled thereto until the duty, if any, is paid or security given therefor." Next it proceeds to provide that "Any corporation or person allowing such property to be so transferred, paid or given contrary to this sub-section shall be liable for such duty."

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(1) [1927] A. C. 934, 938.
(2) (1884) 10 App. Cas. 141.
(3) (1887) 12 App. Cas. 575.

The statute makes no provision for reimbursement of the company from any quarter, and no such provision can be implied. Breach of a statutory prohibition is prima facie a misdemeanour. It could no doubt be argued on the part of a person convicted of the misdemeanour of a wilful breach of the prohibition here under consideration that his guilt involved him only in the liability created by the second enactment in the sub-section, and if that question arises it will be determined. Meantime, it is sufficient to say, as is said in the judgment of the learned Chief Justice in the Court of Appeal, "that sub-section penalises a company which permits any property of a deceased person to be transferred to the beneficiary until the duty payable in respect thereof is paid, and a company so penalised is not entitled to recover the penalty from the beneficiary."

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The costs here and below will be borne by the appellants.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondent: *Blake & Redden.*

Applied. MARRIAGE *v.*
E. NORFOLK RIVERS,
ETC.
[1950] 1 K. B. 284

[HOUSE OF LORDS.]

H. L. (E.)*
1929
Nov. 28.

LORD MAYOR, ALDERMEN AND CITIZENS OF THE CITY OF MANCHESTER . . . . APPELLANTS;

AND

FARNWORTH . . . . RESPONDENT.

Nuisance—Electricity—Fumes from Generating Station—Statutory Powers—Negligence—Special Act—Electric Lighting (Clauses) Act, 1899 (62 *&* 63 *Vict. c.* 19), *s.* 1; *Schedule, s.* 81—*Manchester Corporation Act,* 1914 (4 *&* 5 *Geo.* 5, *c. cxlvi.*), *ss.* 32, 33, 36.

In an action by a farmer against the Manchester Corporation for an injunction and damages on the ground of nuisance by the emission of poisonous fumes from the chimneys of an electrical generating station erected by the defendants in the neighbourhood of his farm, the defendants pleaded that the acts complained of were done in pursuance of the powers conferred on them by the Manchester Corporation Act, 1914.

By s. 32 of the Manchester Corporation Act, 1914, the Corporation were authorized to erect, work and use a station for generating electrical energy on the land in question, which was outside their area of supply, and by s. 33 to make and use electric lines commencing at the generating station and terminating at a point within their area of supply.

By s. 1 of the Electric Lighting (Clauses) Act, 1899, the provisions contained in the Schedule to the Act are to be incorporated with any special Act, save as expressly excepted thereby; and "special Act" is defined as being: "Any Act . . . . authorising the supply of electricity for any public or private purposes within any area." By s. 81 of the Schedule to the Act it was provided that nothing in the special Act should exonerate the undertakers from any action or other proceedings for nuisance in the event of any nuisance being caused or permitted by them:—

Held, (1.) (by Viscount Sumner and Lord Blanesburgh; Viscount Dunedin dissenting) that the Manchester Corporation Act, 1914, was not a "special Act" within the meaning of s. 1 of the Electric Lighting (Clauses) Act, 1899, and that s. 81 of the Schedule to that Act therefore did not apply; (2.) on the facts, that the defendants had failed to prove that they had used all reasonable diligence to prevent their operations from being a nuisance to their neighbours, and that they were therefore liable.

Decision of the Court of Appeal [1929] 1 K. B. 533 affirmed.

APPEAL from an order of the Court of Appeal setting aside a judgment of Talbot J. in favour of the defendants (the

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* *Present:* VISCOUNT DUNEDIN, VISCOUNT SUMNER, and LORD BLANESBURGH.

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appellants) and ordering judgment to be entered for the plaintiff (the respondent). (1)

The appellants were statutory undertakers for the supply of electricity within the city of Manchester and certain adjoining districts and were the owners of an electrical generating station at Barton-upon-Irwell outside their area of supply. The respondent occupied a farm in close proximity to the appellants' generating station.

The respondent by his statement of claim alleged that since 1923 the appellants had constantly caused to issue from the chimneys of their generating station poisonous fumes which spread and were diffused into the farmhouse and over the farm lands with the result that the value of his farm was seriously impaired, and he claimed damages and an injunction.

The appellants pleaded that the acts complained of were done in pursuance of the powers conferred upon them by s. 32 of the Manchester Corporation Act, 1914.

The respondent contended that the Manchester Corporation Act, 1914, was a special Act within the meaning of s. 1 of the Electric Lighting (Clauses) Act, 1899, and that s. 81 (the nuisance clause) of the schedule to the latter Act was incorporated therewith.

Talbot J. held, first, that the Manchester Corporation Act, 1914, was not a special Act within s. 1 of the Electric Lighting (Clauses) Act, 1899, and, secondly, that the appellants had proved that a generating station in the said position could not be used without causing a nuisance; and he gave judgment for the appellants without costs.

The Court of Appeal by a majority (Scrutton L.J. and Sankey L.J.; Lawrence L.J. dissenting) set aside the judgment of the learned judge and granted an injunction and damages.

Scrutton L.J. held, first, that the Manchester Corporation Act, 1914, was a special Act within s. 1 of the Electric Lighting (Clauses) Act, 1899, and that s. 81 of the Schedule to the latter Act applied, and, secondly, that the appellants had failed to prove that they had taken all reasonable precautions to prevent the nuisance. Lawrence L.J. agreed with Talbot J. on both points.

(1) [1929] 1 K. B. 533.

Sankey L.J. held, first, that the Manchester Corporation Act, 1914, was not a special Act within the Electric Lighting (Clauses) Act, 1899, but, secondly, that the appellants had not proved that they had worked their generating station without negligence.

The facts are fully stated in the opinion of Viscount Sumner.

1929. July 8, 9, 11, 12, 15, 16. *Cyril Atkinson K.C.* and *Tyldesley Jones K.C.* (with them *Sydney Turner*) for the appellants.

[VISCOUNT DUNEDIN. Their Lordships will hear you first on the question of law.]

1. The Manchester Corporation Act, 1914, is not a special Act within the meaning of s. 1 of the Electric Lighting (Clauses) Act, 1899, because it does not authorize the supply of electricity "within any area." The Electric Lighting (Clauses) Act, 1899, incorporates in one Act the provisions usually contained in Provisional Orders made under the Electric Lighting Acts, and s. 1 provides that the provisions in the Schedule to the Act shall be incorporated with and form part of every such Provisional Order made by the Board of Trade after the commencement of the Act, save and so far as they are expressly varied or excepted by the Order, and that the said provisions shall also, with the substitution of the words "special Act" for "Provisional Order," be incorporated with any special Act with a similar saving clause; and the section defines "special Act" as meaning "any Act passed after the commencement of this Act authorising the supply of electricity for any public or private purposes within any area." By s. 81 of the Schedule to the Act "nothing in the special Order shall exonerate the undertakers from any indictment, action or other proceedings for nuisance in the event of any nuisance being caused or permitted by them." At the time when the Manchester Corporation Act, 1914, was passed the Corporation had already full power to supply electricity within their area of supply as defined by the Manchester Electric Lighting Order, 1890, and extended

by certain amending Orders, and the Provisional Orders contained a nuisance clause in the same terms as s. 81 of the Schedule to the Clauses Act. What the Act of 1914 did (in s. 32) was to authorize the construction of a generating station outside the area of supply for the purpose of bringing the electricity within the area. It did not extend the area of supply. The Electric Lighting Acts draw a clear distinction between the supply of electricity within an area and the provision of a generating station outside the area of supply. The clauses of the Schedule to the Act of 1899 are inapt for the generating of electricity. That the framers of the Act of 1914 did not consider that the Schedule was incorporated therewith is shown by s. 36, sub-s. 5 (B), which expressly provides that particular clauses of the Schedule shall apply in certain special cases. "Special Act" in s. 1 of the Act of 1899 refers to an Act having the same scope as a Provisional Order and means an Act in terms authorizing the supply of electricity within any area.

2. If the Legislature has authorized the doing of a particular thing in a particular place it authorizes the doing of it, even though it causes a nuisance, provided that it is not done negligently: *Rex* v. *Pease* (1); *Vaughan* v. *Taff Vale Ry. Co.* (2); *Hammersmith, &c., Ry. Co.* v. *Brand* (3); *Geddis* v. *Bann Reservoir* (4); *Metropolitan Asylum District* v. *Hill* (5); *London, Brighton and South Coast Ry. Co.* v. *Truman.* (6) *Canadian Pacific Ry. Co.* v. *Parke* (7) is distinguishable, and it expressly recognizes the authority of *Hammersmith, &c., Ry. Co.* v. *Brand* (3) and *London, Brighton and South Coast Ry. Co.* v. *Truman.* (6)

Singleton K.C. and *Neville Laski* for the respondent. The Act of 1914 is described as an Act to confer further powers upon the Corporation with reference (inter alia) to "the supply of electricity" and s. 32 authorizes the construction of the generating station together with such plant, etc., "as may be necessary or convenient to enable the Corporation to generate and supply electricity." For the reasons stated by Scrutton L.J. this is a special Act within s. 1 of the Electric Lighting (Clauses) Act, 1899, and it has not expressly varied or excepted the operation of the scheduled clauses of the Act of 1899. Assuming that the Act of 1914 is not a special Act "the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature lies upon the persons seeking to justify the nuisance"—in this case the appellants: per Lord Watson in *Metropolitan Asylum District* v. *Hill.* (1)

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(1) (1832) 4 B. & Ad. 30, 41.

(2) (1860) 5 H. & N. 679, 685.

(3) (1869) L. R. 4 H. L. 171, 196, 201.

(4) (1878) 3 App. Cas. 430, 455, 457.

(5) (1881) 6 App. Cas. 193, 199, 211.

(6) (1885) 11 App. Cas. 45.

(7) [1899] A. C. 535.

[VISCOUNT DUNEDIN said that the majority of their Lordships were of opinion that the Manchester Corporation Act, 1914, was not a special Act within the meaning of the Electric Lighting (Clauses) Act, 1899, and that the appeal should be heard on the merits.]

Cyril Atkinson K.C. and *Tyldesley Jones K.C.* (with them *Sydney Turner*) for the appellants. Upon the evidence the powers conferred upon the appellants by the Manchester Corporation Act, 1914, could not be reasonably exercised without causing a nuisance to the respondent, there being in the present state of scientific knowledge no means which the appellants could have adopted to avoid a nuisance.

The authorities establish two propositions of law. (1.) That undertakers who rely on statutory powers to excuse a nuisance have to prove, not that the nuisance is inevitable, but that it could not have been avoided by any reasonable expedients known to science up to date; and (2.) that precautions are only reasonable or practicable if they are consistent with the carrying out of the purposes for which the statutory powers are given. [Upon the first point they cited *Vaughan* v. *Taff Vale Ry. Co.* (2); *Geddis* v. *Bann Reservoir* (3); *London, Brighton and South Coast Ry. Co.* v. *Truman* (4); *Harrison* v. *Southwark and Vauxhall Water Co.* (5); *National Telephone Co.* v. *Baker* (6); *Midwood &*

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(1) 6 App. Cas. 193, 213.
(2) 5 H. & N. 679, 685, 686, 688.
(3) 3 App. Cas. 430, 438, 452, 455–6.
(4) 11 App. Cas. 45, 64.
(5) [1891] 2 Ch. 409, 412, 414.
(6) [1893] 2 Ch. 186, 204.

Co., Ld. v. *Manchester Corporation* (1); *Dumphy* v. *Montreal Light, Heat and Power Co.* (2); *Quebec Ry., &c., Co.* v. *Vandry* (3); and upon the second point: *Port Glasgow and Newark Sailcloth Co.* v. *Caledonian Ry. Co.* (4) It may be objected that the appellants have made no inquiries as to the possibility of working their generating station without creating a nuisance. But it is not negligence on the part of the appellants not to have anticipated damage which has not been found in practice to result from well-tried methods: *Newberry* v. *Bristol Tramways and Carriage Co.* (5) Nor is it negligence to have followed, without independent inquiry or experiment, methods of construction or working which have been generally approved and adopted by experienced operators.

Singleton K.C. (with him *Neville Laski*) for the respondent. The appellants never called in any outside advice until the eve of the trial and it cannot be said that they have, within the test laid down by Willes J. in *Vaughan* v. *Taff Vale Ry. Co.* (6), "taken every precaution, and adopted every means in their power, and which science could suggest," to prevent the nuisance. In the language of Lord Sumner in *Quebec Ry., &c., Co.* v. *Vandry* (7), they are using their statutory powers as a charter to commit a tort. They have failed to discharge the onus resting upon them of proving that it is impossible for them to work this station without creating a nuisance: *Shelfer* v. *City of London Electric Lighting Co.* (8)

Cyril Atkinson K.C. replied.

[VISCOUNT DUNEDIN referred to *Shotts Iron Co.* v. *Inglis* (9) as to the form of the injunction.]

The House took time for consideration.

1929. Nov. 28. VISCOUNT DUNEDIN. My Lords, this case has given rise to much difference of judicial opinion. Its decision is not only of great moment to both the parties concerned but its aspects bring up a question of the widest

(1) [1905] 2 K. B. 597, 608.
(2) [1907] A. C. 454.
(3) [1920] A. C. 662, 680.
(4) (1892) 19 R. 608, 613.
(5) (1912) 107 L. T. 801.
(6) 5 H. & N. 679, 687.
(7) [1920] A. C. 662, 679–80.
(8) [1895] 1 Ch. 287, 309, 313–14.
(9) (1882) 7 App. Cas. 518.

public importance and it would be well indeed if it could be brought home not merely to those interested in the development of the law but to those who in the future are in the position which enables them to settle and control the position of great electrical stations.

I shall begin by stating the undoubted facts as succinctly as I can.

The town authorities of Manchester, in order to supply electricity to its inhabitants, procured in 1890 an electric lighting Provisional Order, duly confirmed by Act of Parliament in that year, which enabled them to supply electricity in a defined area in the city of Manchester. This area was afterwards extended by subsequent orders which it is unnecessary to specify, as they are all in the same position so far as regards the material consideration, to wit, that each and all contain a clause similar to cl. 70 of the original Order: ". . . . nothing in this Order shall exonerate the undertakers from any indictment, action or other proceeding for nuisance in the event of any nuisance being caused by them."

In 1914 was passed the Manchester Corporation Act, 1914. It was an omnibus Act, as may be seen from its title, "An Act to confer further powers upon the lord mayor, aldermen and citizens of the city of Manchester with reference to street works waterworks tramways main drainage works and the supply of electricity and otherwise for the better local government and improvement of the city to alter the wards thereto and for other purposes." There was a description of the lands on which the generating station was to be constructed, extending to 12½ acres, situate not in the city of Manchester but in a rural district a considerable distance from the city. There is then a provision providing for the construction of electric lines from the generating station to the city, and then s. 36 provides as follows:—

"(1.) The whole or any part of the areas for the supply of electricity by the Corporation under the Manchester Electric Lighting Order, 1890, and any subsequent Acts and Orders may be supplied with electrical energy from all or any of the generating stations of the Corporation for the time being, including those now existing and the station authorised by this Part of this Act.

"(2.) The Corporation may by means of electric mains make connexions between the existing generating stations or areas of supply of the Corporation and the generating station authorised by this Part of this Act.

"(3.) The Corporation may also by means of electric mains make connexions between any two or more areas which they are authorised to supply or between any such area and any generating station of the Corporation.

* * * * * *

"(5.) In relation to any such electric mains as aforesaid the Corporation. . . . .

"(B) With respect to streets not within any area which they are authorised to supply shall have the powers and be subject to the provisions of the Electric Lighting Act 1882 and of ss. 10 to 20 60 to 62 69 to 73 76 77 and 79 to 82 of the schedule to the Electric Lighting (Clauses) Act 1899 and those provisions so far as applicable but subject to the provisions of this section shall for the purposes of this section be incorporated with this Act and shall have effect and the Corporation shall be deemed to be the undertakers."

The generating station was duly erected and began to work in 1924. The plaintiff in the present action is a farmer, whose farm is immediately contiguous to the station, and his farm began at once to suffer from the devastating effects of the fumes emitted from the chimneys of the generating station. He raised this action against the Corporation, claiming damages and an injunction. For the present it is enough to say that, after two witnesses had been examined, the Corporation, who had in the original pleading denied the creation of a nuisance, admitted that a nuisance had been caused.

To make clear the defence raised and the controversies arising thereon it is necessary to say a word on the general law.

Up to 1899 procedure was taken by means of Provisional Orders and Confirmation Acts. The Provisional Orders as a matter of fact were wont to contain a nuisance clause similar to the clause above quoted in the Manchester Provisional Order. To obviate the necessity of continued repetition in all Provisional Orders Parliament in 1899 passed the Electric Lighting (Clauses) Act, 1899. It incorporates in one Act certain provisions usually contained in Provisional Orders made under the Acts relating to electric lighting and by s. 1 it is provided that the provisions contained in the Schedule to the said Act shall be incorporated with and form part of every Provisional Order made by the Board of Trade after the commencement of that Act under the Electric Lighting Acts, save so far as they are expressly varied or excepted by the Order; and the said provisions shall also, with the necessary modifications, and in particular with the substitution of the words "special Act" for "special Order," be incorporated with any special Act, save so far as they are expressly varied or excepted thereby. The said section defines the expression "special Act" in the following terms: "The expression 'special Act' means in this Act any Act passed after the commencement of this Act authorising the supply of electricity for any public or private purposes within any area." Clause 81 of the Schedule is in the same terms as cl. 70 of the Provisional Order above quoted.

Now the plaintiff says that the Act of 1914 is a special Act, as defined in the Act of 1899, that consequently there is incorporated cl.81, and that ends the matter. The defendants deny that the Act of 1914 is a special Act, as defined by the Act of 1899. Upon the assumption that they are right in this contention, the defendants then say that the generating station is a thing specially authorized by Act of Parliament, that the emission of deleterious fumes is a necessity of the situation, and that consequently, they are not liable for any nuisance created thereby. They rely on the old and well known cases decided long ago as to the sparks from locomotives, of which *Vaughan* v. *Taff Vale Ry. Co.* (1) may be taken as an

(1) 5 H. & N. 679.

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example. To this the plaintiff replies that the onus of proving that the creation of nuisance is an inevitable consequence of the erection and working of the generating station lies on the defendants, and that they have not discharged that onus.

The action depended before Talbot J. without a jury, who found for the defendants on both points. Appeal being taken to the Court of Appeal, Scrutton L.J. held that the Act of 1914 was a special Act. Lawrence and Sankey L.JJ. held to the contrary, agreeing with Talbot J., but on the second point Scrutton and Sankey L.JJ. (Lawrence L.J. dissenting) held that the defendants had not discharged the onus on them. Judgment was therefore given in favour of the plaintiff.

The precise terms of the order pronounced will be dealt with subsequently. I shall address myself first to the first point. Considering the difference of judicial opinion, no one can say that this is an easy point to determine. Not without misgiving, especially in view of what I know to be the opinion of my noble friends who will follow me, I have finally and determinately come to the conclusion that I agree with the opinion of Scrutton L.J. and that the Act of 1914 is a special Act under the definition of the Act of 1899. The point is whether the Act of 1914 authorized "the supply of electricity within an area." Now to suppose a generating station which was not also a station of supply would be an absurdity. You never want to generate electricity merely in order to earth it, and so naturally you actually find the word supply "a station for generating electrical energy together with such buildings . . . . and things of whatever description as may be necessary and convenient to enable the Corporation to generate and supply electricity." Is it then "supply within any area"?

I think it follows both from the further provisions as to mains, etc., and from the necessities of the situation that it is, and that the area is the area in which under its existing Provisional Orders Manchester is entitled to supply.

Just consider what a generating station is. It is not a place where electricity is on tap to the passer-by, like beer at a public house. The current generated must be sent somewhere and that is arranged for by the provision as to the electric mains. There is a special provision as to where the current generated by the station is to be sent, to where the electric mains are to go. It is to the city of Manchester, and the city of Manchester is in the electrical area which the station is meant to supply, and within which the supply is provided. The terminus a quo is the station itself, the terminus ad quem is the electrical supply area of the city of Manchester. To my mind these considerations are convincing, but I must not omit to deal with the arguments which have prevailed with other minds and there are several. It is said that, inasmuch as in regard to electrical mains there is a special provision for incorporation of the sections of the Electric Lighting Act, that shows that its provisions are not considered as otherwise applied; also it is said that the sections as to the special protection of Trafford Park point the same way. I do not think these arguments conclusive. They only point, I think, to this, that certain authorities and persons were afraid of the Act and sought and obtained special protection.

Then it is said that there would be redundancy between the incorporated clauses and the clauses already in the Provisional Orders. To a great extent they are the same. If any difference cropped up, I consider it would be easily solved by posteriora prioribus derogant.

Then Lawrence L.J. says that because the electricity from the generating station is developed at 33,000 volts it cannot possibly be supplied as such within an area. If that argument were sound, then in most places no electricity can be supplied at all, for it is certain that in most cases the voltage in the mains along the street is greater than can be used directly in the house, and there is a transformer for admission into every house. If the likelihood of the position can be looked at, what reason can there be for carefully providing against a nuisance if the generating station is within the area of supply where people get the benefit of the scheme and yet giving complete immunity for creating a nuisance against those

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who have no interest in the supply and derive no benefit therefrom? I am therefore on the balance of considerations led to the view that the nuisance clause here applies.

That would, of course, end the case, but it is necessary, as this view does not commend itself to your Lordships, that I should consider the second point also.

I do not find this point free from difficulty, but I concur with what I understand your Lordships' view to be. I do so, however, on what I cannot help feeling is a narrow ground, and that ground is, that it has been clearly proved that those responsible for the design and working of this station never considered, when designing, the effect it would have on the neighbourhood, and never asked or obtained outside advice from those skilled in such matters. I have had the advantage of reading the opinion which will be delivered by Viscount Sumner, and I do not think it would serve any useful purpose to say in other words what he has there said. But I do wish to say something on the general question involved, in the hope that perhaps my words may reach the ears of those who may in the future have the matter in hand, either as legislators or as choosers of a station.

First of all I would like to accentuate the gravity of the nuisance caused by the pollution of the air through the enormous output. It is in evidence that on the average consumption of coal 11 tons of sulphur per day are burnt and sent out of the chimney into the air in the shape of sulphur dioxide. When the sulphur dioxide meets with moisture the mischief begins. The practical effect of the mischief at this place is best summarized by the learned trial judge, who, when the defendants' counsel admitted nuisance analysed the admission as follows:—

Talbot J. "I should imagine, from the fact that Mr. Atkinson does not propose to contest the question of fact, that I am justified in assuming that the indication of your case is correct, and that it is a substantial nuisance, that is to say, there is a substantial diminution in the productivity of this farm and a substantial interference with the amenities, comfort and so on of the people who live there."

And again: "I should assume that witnesses say that things will not grow in their gardens and their fields as they used to do, and it is a serious interference with their comfort and possibly their health to some extent."

The serious character of the nuisance naturally makes one reflect on the magnitude of the nuisance which would be caused by stations far bigger than this one, and that such stations are likely in the near future to be established is certain. That brings me to say a word or two on what I conceive to be the well settled law on such matters. The cases are numerous; I may mention *Rex* v. *Pease* (1); *Vaughan* v. *Taff Vale Ry. Co.* (2); *Geddis* v. *Bann Reservoir* (3); *London, Brighton and South Coast Ry. Co.* v. *Truman* (4); *Hammersmith Ry. Co.* v. *Brand.* (5) I mention these to show that I have carefully considered the question but I think it would be of no real service to analyse exactly what was decided in each actual case. I believe their whole effect may be expressed in a very few sentences. When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

Now it is true that in this case we can hold so far that by their callous indifference in planning the construction of the station to all but its own efficiency, the defendants have not discharged the onus incumbent on them. Their own employees stoutly denied the possibility of remedy and if time is given them, as it must be, before injunction is granted, it may be easy for them to get many scientific men to say

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(1) 4 B. & Ad. 30.
(2) 5 H. & N. 679.
(3) 3 App. Cas. 430.
(4) 11 App. Cas. 45.
(5) L. R. 4 H. L. 171.

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they know of no remedy, and so by a sort of vis inertiae practically to throw the onus of finding a remedy on the plaintiff. It is for this reason that I deeply regret that the majority of judicial minds have not agreed with Scrutton L.J. and myself. Had the defendants been under a nuisance clause they would have really exerted themselves to find a remedy; as it is, they are more than likely to sit with their hands folded; and other municipalities, seeing the law, will avoid Provisional Orders when arranging for a generating station outside their own boundaries and trust to getting authority in an omnibus Act as here, which according to decision will not be a special Act which would contain a nuisance clause along with it. It is for these reasons that I do hope this case may attract public attention, for assuredly the dangers it discloses are a matter of great importance to thousands of people.

The order of the Court of Appeal which is in the terms dictated by Scrutton L.J. at the close of his judgment in that Court appears, so far as the unqualified injunction embodied in it is concerned, to be based upon the view expressed by him that the defendants were in law under a nuisance clause. As your Lordships do not, as I understand, share that view, it will be necessary that the terms of the final injunction should be modified, and there are one or two other minor matters in regard to which the ultimate order may with advantage be adjusted. Although, therefore, on the above footing the appeal will still be dismissed, I suggest to your Lordships that its dismissal should be accompanied by the following declaration of the House as to the final terms of the order to be made by the King's Bench Division to which the cause will be referred.

Declare by way of modification of the judgment of the Court of Appeal dated December 13, 1928 :—

1. That the damages to be recoverable against the defendants should be such as have been sustained by the plaintiff up to the date when the injunction by the order awarded shall have ceased to be suspended or shall have been dissolved whichever event shall first happen.

2. That immediately after the injunction there should be inserted in the order the following clauses :—

"with liberty reserved to the defendants to apply to a judge of the King's Bench Division to dissolve the said injunction

(*a*) on their establishing, if it be not admitted by the plaintiff, that they have exhausted all reasonable modes of preventing mischief to the plaintiff, and

(*b*) on their submitting in the future conduct of their power station to adopt and use the most effective of these modes until they have replaced them by other reasonable but more effective modes of prevention which may thereafter be discovered, and which will thereafter be adopted and used."

3. That the first suspension of the injunction should continue for one year from the date of the order of this House in lieu of one year from the date of the order of the Court of Appeal.

I move, your Lordships, that with these modifications of that order this appeal therefrom be dismissed and that the cause be referred to the King's Bench Division to act in accordance with your Lordships' declaration. The respondent will have the costs of the appeal to this House.

VISCOUNT SUMNER. My Lords, this was an action for a common law nuisance, which the appellants seek to justify. The nuisance itself being admitted by them, their liability depends (1.) on the construction of their private Act of 1914 and (2.) on proof that they have taken all due and reasonable steps to prevent the nuisance. The first question must ultimately turn on the construction of s. 36 of the Manchester Corporation Act, 1914. The area of supply, permitted to the Corporation as undertakers of an electricity concern, and the purposes of that supply, as well as the authority to furnish it, were all fully dealt with in their Electric Lighting Order of 1890, under which business was carried on. The further powers given in 1914, though stated in the title to be, among others, powers "with reference to . . . . the supply of electricity," were mainly powers "with reference to" generating the electricity for that supply. Sect. 32, sub-s. 1 (A), gave authority to "construct maintain alter improve enlarge extend renew work and use" upon the site of 12¼ acres, as described, "a station for generating electrical energy together with such buildings or . . . . things of whatever description as may be necessary or convenient to enable the Corporation to generate and supply electricity," and s. 36, sub-s. 1, provided that "the whole or any part of the areas for the supply by the Corporation under the Manchester Electric Lighting Order 1890 . . . . may be supplied with electricity from all or any of the generating stations of the Corporation for the time being." I think this in effect says: "You may get the current to be supplied by you in your existing supply areas either from your old generating stations or from this new one outside the city boundary at Barton-on-Irwell, as you please." Then what if they cause a nuisance in fact? It would be no bad thing if the Legislature, when granting powers such as these, were to make it a rule to insert a proviso subjecting the exercise of them either to the condition that all due and reasonable care and precautions against causing a nuisance must be taken or to the condition that no nuisance shall in fact be caused by the exercise of them, and this in express and uniform terms. As it is, the "nuisance clause," contained in the Electric Lighting Clauses Act, 1899, is only attracted to this Act of 1914 if it is a "special Act," as defined in the Act of 1899, and among other things authorizes the supply of electricity to consumers for public or private purposes, as there defined, by named undertakers, and I am not satisfied that any of these conditions is fulfilled by a mere provision for furnishing the area of supply with electrical energy from Barton as well as from existing stations. Sect. 36, sub-s. 1, says nothing about the persons, whom the Corporation will cater for, or the purposes for which their current will be consumed, and an authority to supply areas, already named and provided for in 1890, would have been surplusage in 1914. Sub-ss. 4 and 5 of s. 36 support this view, since sub-s. 4 is a provision for a named and additional supply for consumption at the Corporation's own sewage works at

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Davyhulme, and sub-s. 5 is an incorporation of some of the electric lighting clauses of 1899 and in particular of No. 81, "the nuisance clause," for the specific purposes of this section and in relation to electric lighting mains and other things but not generally. This goes to the root of the matter, for the first question is "What did the Legislature authorize?" The sections can be read as directing the use of such a plant as was originally erected or even as relieving the Corporation from liability for nuisance on proof that all due care has been used. The case becomes one of quite a simple proof. I think the condition of freedom from liability is proof of due care but not that any particular plant or user can be implied from the general terms employed. The appellants are right in saying that the Manchester Corporation Act, 1914, is not a "special Act" within s. 1 of the Electric Lighting Clauses Act of 1899, but in effect varies or excepts the operation of the scheduled clauses of that Act. What is required of them is to use all due and reasonable means and precautions to avoid a nuisance. The burden of proving that they have done so is on them.

The plaintiff and his agricultural expert clearly described the damage done. The station lies to the east north east of the farm, which, as the prevalent winds are from the west, is a relatively favourable position; but they speak of blue grey fumes dropping towards the ground, scorching hedges and fruit trees, rendering grass unpalatable to cattle and making land useless for pasture. In some cases the land itself is permanently injured and one field was for all practical purposes derelict.

"Q. 75. Fumes containing sulphur, if deposited on the soil by means of rain, of course will tend to remove compounds of lime and other bases from the soil; therefore, the removal of bases is quite apparent by a determination of the acidity of the soil, that is to say the acidity will increase in proportion as the bases are removed. Q. 77. In a number of cases the soil acidity has increased to an abnormal extent."

In May, 1924, the Corporation's own chief chemist, reporting to the Electricity Department on samples of vegetation from fields near the station, says that they "had light brown patches on them, as though they had been affected by frost. The patches on several of the blades gave a distinctly acid reaction, whereas the green portions were neutral. This suggests that, during a night dew or immediately after rain, drops of water on the blade had absorbed acid from the atmosphere with the result that the vegetable matter has become bleached in parts. The fumes from the boiler stacks contain sulphur dioxide, which is a powerful bleaching agent in the presence of water."

As to the nuisance itself, there is no doubt about the cause of the mischief and the way in which it operates. Even your Lordships' House has been familiar with it for nearly fifty years: *Shotts Iron Co.* v. *Inglis.* (1) Although from this elaborate plant ordinary black smoke is hardly produced at all, the sulphur content of the coal, if consumed, would not increase the heat liberated. It is economically a waste product, not worth the cost or trouble of recovering, so it goes up the chimney and at the top the Corporation is rid of it. If it pollutes the atmosphere, others suffer. Thus the cost of the process like its thermal efficiency is kept at the optimum. This result is not really inevitable but it is the way in which the station is worked, and, as many people may perhaps think, ought to be worked. The ordinary South Lancashire soft coal contains some 2.2 per cent. of sulphur and this is the coal that the defendants use. Still coal is to be bought which is practically sulphur free. During the coal strike of 1925 the Corporation of Manchester imported and used such coal from the United States. To use such fuel regularly would certainly be very costly and it would be difficult and perhaps impossible to get enough of it. It was no part of the plaintiff's case that the use of ordinary Lancashire coal was in itself negligent, but all the same the station causes a nuisance, not because the Legislature has so willed it, but because the Manchester Corporation make their profit by working in this way. It is not, however, a mere question of weighing the expense involved on the defendants' side against the money lost

(1) 7 App. Cas. 518, 522.

on the plaintiff's, and, furthermore, the more nearly the use of coal containing sulphur is shown to be unavoidable, the more imperatively necessary is the use of some means of eliminating or neutralizing the sulphur, and the harder is it to believe that no remedy can be found.

The plaintiff's counsel, having been dispensed from giving further proof of a nuisance in fact, called his expert evidence and closed his case instead of asking leave, as he might have done, to call it in reply, and thus a turn was given to the case, which almost amounts to a reversal of the burden of proof. The plaintiff's witnesses having pointed out when the mischief originated, and having suggested more or less concrete remedies, the defendants' witnesses simply repelled these suggestions, partly by alleging inconvenience or expense, partly by throwing cold water on them. I will take them seriatim.

Mr. Rideout was cross-examined with the object of showing that the discharge of the sulphur cannot be helped, as follows :—

" Q. There is sulphur in all coal is there not ?—Not in all coal to any appreciable extent.

Q. There is in all coal that is used for commercial purposes ? —A certain amount.

Q. And this necessarily goes up the chimney ?—Not necessarily.

Q. You do not suggest there is any way of getting rid of it, do you ?—I suggest that it is not necessary for the whole of the sulphur, which is in the coal, to go up the chimney in the form of sulphurous compounds.

Q. But some comes out of every chimney ?—Some comes out." (Qs. 188–193.)

Thereupon the cross-examining counsel changed the subject and the witness was not brought back to it. Afterwards, when the defendants' witness, Mr. H. C. Lamb, was giving evidence he was, according to the shorthand note, asked in cross-examination :—

" Q. Did you consult any other electrical engineer apart from the one who came a fortnight ago and the one who came a few days ago ?—No.

Q. Or have you consulted any chemist at all ?—With the object of removing the sulphur dioxide gas from the fumes, yes.

Q. Have you consulted any chemist in connection with these complaints ? Mr. Justice Talbot : As to whether there was anything you could do to get rid of this nuisance, which we now know was undoubtedly caused to the neighbourhood ?—No." (Qs. 1610–1613.)

During the argument before your Lordships this passage was read. Thereupon counsel for the appellants interposed and informed your Lordships that Mr. Lamb was in Court and denied that he had given this answer. According to him the note should have run :—

"1611. Q. Or have you consulted any chemist at all ?—With the object of removing the sulphur dioxide gas from the fumes ?

Q. Yes ?—No."

Prior to this two other statements had been made, which I must refer to. Mr. Lamb had been asked in cross-examination, Q. 929 : "I take it you will agree with me that it is possible to generate electricity without causing a nuisance ? " and had replied "It all depends upon what is meant by a nuisance. It is not possible to generate electricity or to create power by burning coal without sending sulphur dioxide into the air," and when the next witness, Mr. C. B. Taite, was called the defendants' leading counsel said to him in chief, Qs. 1128, 1129 :—

"Q. It is not suggested that there is any known means of getting rid of this sulphur. It is bound to come out of the chimneys ?—Quite.

Q. I think that is common ground. At any rate that is your view ?—That is my view."

My Lords, I think there was a misapprehension, natural enough on the part of the counsel but not so much so in men of science. As was explained on both sides, the action which takes place is as follows. The sulphur quits the chimney top as a hot gas, sulphur dioxide, which is lighter than the atmosphere. If in that state the gas meets with rain or with a considerable amount of humidity in the atmosphere "the rain does not carry it away with it. It washes some of the sulphur dioxide out of the chimney gas but it does not carry the chimney gas itself in any direction (Q. 696). It will be carried down in solution in the raindrops. After it has been raining this gets carried down and then the sun comes out and you get your patching." (Qs. 635–636.)

It seems to me, not as a matter of physical science, but of obvious logic, that, as the pernicious fumes are at first inside the chimney and only when outside do the mischief, it would be proper to find out whether the gas could not be dealt with when it is still inside, so as to prevent the sulphur from passing outside. This is, I gather, what Mr. Rideout referred to, when he said that it was not necessary for the whole of the sulphur in the coal to be ejected at the chimney mouth, the amount of mischief that it takes to produce an actionable nuisance being of course a matter of degree, and this positive evidence distinguishes the case of *Newberry* v. *Bristol Tramways & Carriage Co.* (1), where the contention that something could and should be done, rested partly on the appeal of counsel, partly on the convictions of the jury, but was not founded on the evidence of any competent person. All that Mr. Lamb and Mr. Taite say is that the sulphur cannot be got rid of altogether and that electricity cannot be generated without sending any sulphur dioxide into the air at all, which of course, is not an answer to Mr. Rideout's suggestion, but (however unconsciously) is an evasion of it. As to the correction, which Mr. Lamb makes of the note of his evidence, it is not very convincing and certainly is very belated, but either way it leaves the appellants in their difficulty. If they consulted a chemist they have not ventured to call him or to produce his report. If they did not, though the question of getting rid of some and possibly enough of the sulphur dioxide before the gas is emitted from the chimney is one which at any rate presents itself, they have dismissed it for reasons of their own without taking the opinion of any chemist on its practicability or effect.

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(1) 107 L. T. 801.

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When Dr. Travers, the plaintiff's second expert, was called he directed his criticisms to the chimneys of the generating station. He said that they were too many, too crowded and too short, and he explained the effect which these factors have in massing the fumes within a short distance of their point of escape and the consequent precipitation of the sulphur compound on to the adjacent fields. He further pointed out that the slow mechanical draught, adopted for the purpose of fuel economy, increased the difficulty of disposing of the fumes innocuously and therefore made it all the more necessary to adopt his suggested improvements in connection with the chimneys. I may summarize his explanation without setting out his technical arguments. To get rid of the fumes without causing a nuisance, they should be emitted at as great a height and with as much velocity as is reasonably practicable. By distributing them over so much wider an area of atmosphere and increasing so much the depth of the atmosphere to be passed through before they can reach the ground, the mischief may be attenuated and nuisance to individuals kept below what the law takes notice of; by brisker ejection even at a lower height wide and prompt distribution is obtained, which dilutes the gases and makes them harmless. If then the emitting chimneys are so clustered together as to counteract this distribution or so numerous as to retard it, they are in these respects faulty. In his view the heated gases, as they rise up steel chimneys such as these are, increase the atmospheric temperature and consequently induce an upward current round the outside of the chimney, which, when they reach the chimney mouth, assists to lift them rapidly to a height greater than that of the chimney itself and so is of value in attaining loftier distribution. This effect ceases at about 200 feet; a higher chimney has to eject its fumes by the draught created inside itself, but in practice so valuable has emission at great heights been considered to be that, in the United States and in Saxony, chimneys of smelters are carried to 300 feet to obviate the deleterious effect of the fumes upon persons and property in the immediate neighbourhood.

On the other hand, an increase in the number of the chimneys of a factory tends to defeat this induction and placing them near together distracts and confuses the effect of the current; hence in theory the fewer there are the better.

My Lords, whatever may be thought of the prospects of improvement which these suggestions hold out, they are at least intelligible and coherent and deserved more attention than they got from the defendants and their experts. In substance their answers came to this. The plant was designed to work with many chimneys and was so constructed. To lead all the flues to one chimney, if ever practicable in view of the great size of the flues required, is not practicable now. The design was for a row of chimneys, placed at distances determined by the spacing of the furnaces and boilers and limited in height by the weight, which the members of the structure were designed to bear. The plant was not designed for a draught that would eject the fumes with force. They were deliberately led by mechanical draught slowly and gently up to the orifices with a view to keeping down the expenditure of energy and therefore the cost of fuel. These things were originally the best of their kind and cannot now be altered. Raising the chimneys had been tried but was fruitless and, besides, they could not be carried any higher. As to the practice abroad of building very lofty chimneys, the witnesses knew nothing about it and as to the effect of induced currents and more forcible ejection, so far as they understood the suggestion, they did not think it would do. Of the four witnesses called, two had never seen the plant till a few days before the trial, and then only for short periods, a third was in large part responsible for the boilers and furnaces, and the fourth was in practical charge and was identified with the working complained of. That they were first-rate practical men no one doubts and I am not to be understood as impugning their good faith, but, as was almost inevitable in their position, their minds had never been brought to bear on the problem as the law states it.

My Lords, I do not think, nor do I suppose that Dr. Travers thought, that the Corporation should have scrapped their mechanical draught apparatus, pulled down their cluster of chimneys and constructed one giant shaft to serve all their furnaces, any more than I think that they can be required to use only non-sulphurous coal. The significance of these matters is quite different. If, in a plant, to which the Legislature has given a general sanction without prescribing any particular design, coal is burnt so as to emit into the lower strata of the atmosphere sulphur dioxide in such conditions as are likely to cause considerable mischief, I think that, in proportion as the undertakers are free to use such a mischief-working process, their obligation to find some correlative means of protecting their neighbours becomes more exacting. The nature and degree of the plaintiff's suffering and the cost, trouble and inconvenience to the defendant Corporation of saving him from it are elements on the two sides of the case, which must be considered in deciding what is reasonable, but I cannot see that either on principle or on authority it is a sufficient answer to a criticism, otherwise sound, to say that, if so, Manchester's electricity would cost it more. Yet this was more than suggested in argument, and one witness, Mr. Taite, was led to say so in terms :—

"1275. Q. If you did increase your draught, you would be burning more coal for the same result ?—Yes, that is so, and you would cause considerable damage to your plant.

Q. And eject more sulphur, incidentally, from your chimney ?—In proportion to the coal burnt.

Q. If you use more coal for the desired result and you have to get a certain number of units to meet the demand, the more coal you use to produce that result the more sulphur goes into the air ?—Yes, that is so.

Q. Therefore it is to the interests of the public that as little coal should be used as possible ?—That is so.

Q. That means efficiency in every direction ?—Yes.

Q. That is just the problem ?—Yes." (Qs. 1275–1280.)

I do not know by what authority, short of the express direction of the Legislature, the interests of the public are thus summarily to override the rights of the individual.

My Lords, the conclusion to which a close examination of the evidence has forced me is that the defendants have not shown that a generating station, such as the Legislature contemplated in 1914, whatever that may have been, could not have been erected then and cannot be used now without causing a nuisance, but that they have failed to show that they have used all reasonable diligence and taken all reasonable steps and precautions to prevent their operations from being a nuisance to their neighbours, and this for two reasons. (1.) At the time of the erection their responsible officers never directed their minds to the prevention of the nuisances, which it was quite obvious might occur, but (2.) they were under the impression that, for all practical purposes, so long as their plant was efficiently and successfully conducted, the neighbours must endure their consequent injuries with such stoicism as they could muster. The proof of this is writ large in their answers generally, but there are three or four passages so simple and so surprising, that I will ask permission to quote them. The first comes from Mr. Lamb :—

"Q. Is it part of the necessary result, so far as your experience in Manchester goes, that if you put down a generating station it must do damage to the farm of somebody half a mile to a mile away ?—I should imagine that is so.

Q. I would like to know whether or not, when you designed this station, if you did design it, you anticipated any trouble whatever to the plaintiff's farm ?—No. This was a good site for a power station and this land we knew was intended eventually for industrial purposes, and therefore no reason occurred to us why a power station should not be put in that situation." (Qs. 939, 941.)

Again :—

"Q. Have you ever experienced this sort of trouble in any other generating station ?—No.

Q. No ?—By which I mean we never had any complaints regarding any of our other generating stations.

Q. Had you suffered annoyance in any way from sulphur fumes made or had any one complained?—No, we had no complaints.

Q. Had you in mind, in any way whatever, damage which might be done by sulphur fumes before you erected this station?—No." (Qs. 776–779.)

And

"989. Mr. Justice Talbot.—You say, as I understand, that, if you had to start with a clean slate, you would first of all design it as well as possible, as it is admitted these works are, for the purpose of generation?—Yes.

Q. Then, if you were asked or if it were said to you: 'Well, but you know this is a place where we are bound to get complaints, if sulphur fumes are generated and contaminate the surrounding country; you must avoid that,' you say there is no way you know of by which you would avoid it?—There is nothing that I know of, my Lord.

Mr. Atkinson.—I suppose you have discussed it with other people, too?—I have.

Q. You have taken advice as well and you cannot learn of anything?—We should take a good deal more advice, if we were beginning to build a new power station, no doubt." (Qs. 989–992.)

My Lords, I think it is quite plain that at the outset these officials did not concern themselves about nuisance at all. There may be some practical excuse for this. Those, who know Manchester, know well how many chimneys have long poured into the atmosphere the waste products of the combustion of soft coal and admittedly plenty of factory chimneys are visible from Barton. The law in this country is not unkind to those who commit nuisances in the way of their trade. The complainant must prove his case and it is no light matter, when so many are all doing the same thing, to show that his particular injury is the defendants' doing. Sulphur compounds, when they fall on the slate roofs and brick walls of factories and on spoil banks or mill lodges do not perhaps do them much injury, and mere personal annoyance is not often worth the cost of an action, when the plaintiff is a mere inhabitant while the defendants are the Corporation of Manchester. The defendants' officials of course knew that the fumes would be injurious, but they did not think it worth while to go to meet trouble.

The plant was completed and began to work in 1924. The consumption of coal was from the first prodigious and for the last accounting year before the trial it amounted to 560 tons of coal, containing 11 tons of sulphur, for every twenty-four hours. A considerable increase of this will be involved in the Corporation's plans as the enlarged plant comes into use. From the first there were complaints, some from the sanitary inspector of the local authority, some from private persons, of whom the plaintiff was one but not the earliest. The first reply was curious. The appellants wrote on April 4, 1924: " We have never met with trouble of the character before at any of our power stations, although the conditions from the point of view of humidity of atmosphere are far worse than they are at Barton." I do not think that anything was or could have been made at the trial of this point about the dry climate of Barton-on-Irwell. In order to account for what happened it was further suggested that at Barton-on-Irwell there must be some local peculiarity. A hill was, I think, mentioned, though where the hills are at Barton-on-Irwell the evidence did not disclose. The direction of the wind was also a cause of some speculation, which however died out, when it was remarked that, whatever may be the prevalent wind, if any, the plaintiff when the wind was his way, as often happened, was bound to get the appellants' sulphur and suffer by it. Another complainant was told (May 17, 1924): " We have never experienced any similar complaints regarding fumes from the chimneys of the Corporation's power station at Stuart St. and am at a loss to understand why it should be so at Barton. The matter is being most carefully investigated with a view to ascertaining the cause and finding a remedy, if the chimney is at fault," and when the Farmers' Union had written to complain on behalf of several of their members, who were farming near the power station, the Corporation stated on June 19, 1924, that " steps are being taken to mitigate the effect of the fumes on surrounding crops." These steps consisted in twice lengthening the chimneys, evidently in the belief that a remedy might be found in this direction, and Messrs. Babcock & Wilcox, their boilermakers, agreed that it was an experiment that should be tried (Q. 827). The first lengthening did not end the complaints but there were not so many after it as before (Q. 821), and, as it was "hoped to avoid any further complaints by raising the level at which the gases were discharged" (Q. 824), the chimneys were lengthened again. To question 830, "In so far as the raising of the chimneys is concerned your difficulty is now that you dare not put more on because of the structure ?" Mr. Lamb replied "That is so," but, although 3600*l.* is given as the cost of twice lengthening the chimneys, no evidence is forthcoming as to the possibility or the cost of strengthening the roof, so as to enable the chimneys to be raised again. Mr. Lamb said that complaints had not ceased with the lengthening and that accordingly he thought that raising the chimneys further would not cure the nuisance. I think that here the wish was father to the thought. It appears to me that the defendants must definitely be taken to have believed in 1924 and 1925, that the length of the chimneys was in fault and that raising them might prove to be the way out. They must have thought the probability considerable or they would not have repeated the operation. Why is it that they now say that further raising would not have improved matters ?

On this there are two respects, in which I think there was misapprehension at the trial. At Qs. 1605 and 1606 Mr. Lamb, being asked "Had you consulted any other electrical engineer before building these works ?" replied: "Is your point with regard to eliminating the sulphur fumes from the gases ? We know nothing from our general knowledge of any system ever devised for getting the sulphur fumes out of the gases."

Again, on the question of raising the chimneys, Talbot J. says: "You have to look at these things as a practical matter. You cannot possibly overtake the increased consumption by raising the chimneys; you would have a thing like the Tower of Babel before you had done. . . . . The intention of Parliament in 1914 undoubtedly was to have a station, which would ultimately supply a very large area in very large quantity and they must have contemplated an enormous consumption of coal at this one place."

As to the first respect, I think that the witness directed his mind to the wrong point. The suggested obligation of using reasonable care to avoid the nuisance is not the same thing as actual elimination of all the sulphur content, a thing which may be very difficult. If enough can be removed to prevent the residue doing substantial mischief, the duty is discharged, and, if raising the chimneys, by diffusion of the fumes over a larger and higher area, helps to attenuate the sulphur gases, its discharge is made all the easier. As to the second, no doubt the Legislature contemplated a large generating station and, if the power to extend or enlarge it were exercised, further large generating buildings and plant, but I do not see how this negatives designing the chimneys in such a way as to mitigate the discharge of sulphur and keep it from becoming a nuisance from time to time. No particular plan, or type or system is specified. All that is to be done is to be subject to the use of reasonable care and skill to prevent a nuisance, and if the increase of the number of chimneys involves a proportionate increase in the coal consumption, the exercise of the power to multiply chimneys may also impose an obligation to heighten or otherwise modify the chimneys accordingly. I find it hard to read into the very wide and very general terms, in which the Legislature authorized the erection and use of a power house at Barton, anything which finally stereotypes the plant when erected and exonerates the undertakers from all further attempts to mitigate the sulphur nuisance. It was further contended that the defendants were not obliged to keep their apparatus always up to the latest improvements, or to become inventors themselves (for which *Vaughan* v. *Taff Vale Ry. Co.* (1) and *National Telephone Co.* v. *Baker* (2) were cited), nor were they prevented from abandoning tall chimneys with strong

(1) 5 H. & N. 679.

(2) [1893] 2 Ch. 186, 203.

natural draught in favour of shorter chimneys with slower mechanical draught, if experience showed that higher efficiency would thus be obtained. I do not think that *Vaughan's* case is in point here. There the railway company had already in use an efficient spark arrester of an approved pattern and accordingly were not in default merely because there had come on the market another contrivance, newer and somewhat better. Here the defendants have never employed any apparatus to limit the amount of sulphur discharged or even thought of the matter at all. It is not even a case where the undertakers thought that their plant was so much superior to any former plant in this respect that precautions were needless, though even here a jury would have been free to say that their complacency was mistaken : *Fremantle* v. *London and North Western Ry. Co.* (1) They did, as part of the original plant, supply " baffles " to arrest the grit from going up into the air, a device first put into use at Barton which cost a good deal of money, but they not only have not installed but they do not seem to have tried to find anything that might limit the discharge of the sulphur. Nor is it a question of barring the defendants from taking advantage of scientific progress by discarding older precautions in order to promote efficiency while observing other precautions in substance equally effective and the best of their kind in use : *Port Glasgow and Newark Sailcloth Co.* v. *Caledonian Ry. Co.* (2) What is meant by saying that undertakers are not to be inventors ? They are not bound, either themselves or by others, to invent in the sense of making some unreasonably difficult discovery, but in the case of a new plant, any one, who knows anything of practical engineering, knows also how common it is to call on experts to devise some new means of guarding against a known danger or of facilitating a known result and such things are devised to order, though they are not dignified by the name of inventions or protected on the ground of patentable novelty. As it is, the appellants have never put themselves in a position to say that a nuisance by sulphur is necessarily incidental to the emission of the fumes nor that prevention is only possible by some extraordinary means or at the price of defeating the enterprise, which the statute authorizes: *Quebec Railway, &c., Co.* v. *Vandry.* (1) They stopped short of the first and never approached the second. It must be remembered that, in making reasonableness the measure of what must be done before the production of a nuisance can be excused, the law, as it always does, means reasonable according to all the circumstances, and reasonable not only in the interest of the undertakers but also in that of the sufferers. The Legislature in authorizing a very great concern must not be taken to be chary of requiring that great care is to be taken. Great powers often involve great responsibilities and before the defendants can be said to have proved that they have done all that they reasonably can, I think that they ought to have done a good deal more than they have done to find out what can usefully and reasonably be done.

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(1) (1861) 10 C. B. (N. S.) 89.

(2) 19 R. 608, 614.

Of course, the absence of any original precaution to prevent a nuisance and the meagre extent of the appellants' inquiries outside their own staff and tradesmen are not substantive wrongs in themselves. If by good luck the Corporation should be able to prove that no such precaution was possible, even if they had sought it at the time, and that none can be found now, then their shortcomings in both respects would not prejudice them. The significance is very different. To people, who have neglected such ordinary inquiry, in a matter in which it is more in their interest to fail than to succeed, I do not attach much credence when they say that it was all no good. The witnesses called, however honest. were tinged with inevitable pessimism and in the face of the plaintiff's evidence I cannot believe, merely because they say so, that the accessible resources of civilization have been exhausted. If it be so, I cannot help thinking that the Legislature may have to reconsider the propriety of granting to undertakers in this field clauses and powers of the present type.

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(1) [1920] A. C. 662.

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It is important to remember that the first question—namely, whether the appellants can justify their nuisance, is by no means the same thing as showing that the injunction itself should be modified or discharged. How high the task of justification may be put will appear from Lord Watson's well known words in the smallpox hospital case (*Metropolitan Asylum District* v. *Hill* (1)): "I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specific position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance." I have not sought to adopt for the purpose of this case the most extreme expressions to be found in the books, finding it enough to rely on reasonableness and the duty to take all reasonable care and precautions, but in any case the authority to erect and work the plant and the obligation in both respects to use reasonable care and precautions are correlative and erection cannot be so severed from use and maintenance as to entitle the undertakers to go on permanently using a plant with all its original imperfections unremedied, merely on the ground that original faults in construction must be deemed to be irremediable in subsequent use. Reasonableness applies not merely to construction but to improvement. It is not necessary to discuss the extent to which a plant, if good of its kind when first put up, may be maintained unaltered by virtue of this Act, though science progresses and beneficial alterations become feasible in practice, for here the plant in respect of sulphur nuisance is not shown to have been good of its kind and therefore the question of altering it is not a closed one. It

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(1) 6 App. Cas. 193, 212, 213.

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becomes a question, among other things, of expense, but it is an open question still.

Again, even though possible alterations and improvements may not be such that a mandatory injunction could go for their adoption or that the appellants could be restrained from using the plant without them, they may still be liable in damages for nuisance caused by the deficiencies in the plant, which might have been averted by reasonable care in the first instance. The remedy for the lack of such care is not necessarily injunction or nothing, for this would be turning the discretion of the Court in a matter of remedy into an authority from the Legislature to dispense with the implied condition to use reasonable care.

I agree with the motion proposed from the Woolsack.

LORD BLANESBURGH. My Lords, like my noble friend opposite, I have reached the conclusion that the Manchester Corporation Act, 1914, is not a "Special Act" within the meaning of the Electric Lighting (Clauses) Act, 1899. Except accordingly to the extent to which it is in terms incorporated, the "nuisance clause," 81, in the Schedule to the Clauses Act has no place in the Act of 1914. This means that the plaintiff in his present contest with the defendant Corporation has neither the nuisance clause nor any other like protection to rely upon. It means also that so soon as the Corporation are in a position to establish that in the working of their power station at Barton they are acting without negligence in the sense in which in such a connection these words are used, they are relieved of all further liability to the plaintiff for nuisance, however great and complete may be the continuing damage to his crops and farm lands occasioned by the working of their station.

With the noble Viscount on the Woolsack I think that result unfortunate. Very readily would I decide, if I felt at liberty so to do, that the loss resulting to the plaintiff from the defendants' operations should without any qualification be borne by the Corporation. That loss is truly just as much part of the cost of generating their electrical energy as is, for example, the cost of the coal whose combustion is the original source of all the mischief. In a question between the plaintiff on the one hand and the Corporation on the other I can discover no sound principle why this loss should not be theirs. The plaintiff's lands are outside the area of supply. He is not himself resident within it. He derives no benefit from, has no concern in, responsibility for nor control, direct or indirect, over their electrical undertaking or its working. Why then should the final burden of such damage as has been proved in these proceedings rest upon him and not upon those causing it and through them upon those benefiting by or interested in the undertaking of which this power station forms a part? It is indeed difficult to say.

Very readily, therefore, if I felt myself so entitled, would I extend to the plaintiff unqualified protection in this matter. And all the more willingly, seeing that, as a result of a careful perusal of the Act of 1914 and a consideration of the situation at its date, I am forced to conclude that the Act, while doubtless giving effect to the proposals of the Corporation in the terms in which these were made, embodies no conscious legislative appreciation of the consequences, probably then quite unforeseen, which have resulted from their acceptance. I do not blame the Corporation. They were not without warrant in asking that their proposed power station should be untrammelled by any nuisance clause. In 1898 a Joint Committee of both Houses of Parliament had reported in favour of compulsory powers being granted to undertakers for the acquisition of land for generating stations and had recommended that where the site of a generating station was acquired under such powers the undertakers need not be subjected to any liability beyond that which, according to Lord Blackburn in *Geddis* v. *Bann Reservoir* (1), is imposed by the common law in the case of persons exercising statutory powers and duties—a liability the nature of which I have already paraphrased. And there were instances on record of Private Acts in

(1) 3 App. Cas. 430, 456.

which that recommendation had been accepted. The Corporation might quite well ask that it should be accepted again.

But what were the circumstances here ? The three existing stations of the Corporation, each within the area of supply, had all of them, presumably for the protection of property also within that area, been made subject to the clause. In which circumstances it seems of all things most unlikely that Parliament, if the consequences had been fully envisaged, would have sanctioned, as on my view of the statute it has sanctioned, a scheme whereby the Corporation are enabled to scrap their existing stations, to concentrate the generation of all energy—to an extent limited only by the area of the site they were empowered to acquire—in a new power station outside their area, and, untrammelled by the nuisance clause altogether, from that station to damage the property of persons entire strangers to Manchester and its undertakings. It is not as if, in this Private Act, Parliament had confined the plaintiff and others in his position to a remedy in damages, so that the working of the power station might not at their instance be liable to be stopped by injunction. In an area predominantly manufacturing or industrial much may be urged in favour of such an adjustment of competing rights and interests like those with which we are here concerned. But in this Act, as I am constrained to read it, Parliament has gone much further. Upon complying with conditions of carefulness which need not shield the plaintiff's crops from complete destruction, the Act leaves him without any relief or remedy either in damages or by injunction for the loss he sustains.

I have said enough to show how readily I would have concurred in the view of the Act taken by the noble Viscount on the Woolsack had it appeared to me to be open to your Lordships. But I can see no answer to the many effective reasons for the opposite construction which at the trial have been given by Talbot J., in the Court of Appeal by Lawrence L.J. and Sankey L.J., as he then was, and in this House by my noble friend opposite. To my mind these reasons or most of them appeal with a force not to be resisted. I would only weaken them by repetition, and I confine myself to making one addition to the list, trivial perhaps in itself, but strongly confirmatory, as I think, of the conclusion induced by the others. Sect. 60 of the Schedule to the Electric Lighting (Clauses) Act, 1899, is, like s. 81, one of the sections of that Act which by s. 36, sub-s. 5 (B), of the Act of 1914 is incorporated for the purposes of that section. The s. 60 referred to requires the undertakers to make a map of their whole area of supply with the details applicable to that whole area and to all the existing mains, service lines and other underground works and street boxes as thereby prescribed. By sub-s. 7 of s. 36 of this Act of 1914, however, the only map which in obedience to s. 60 the Corporation is required to make is to be a map or maps of so much of the districts traversed by any main laid down under the powers of s. 36 as may be necessary to show the course of such main. And no more. To my mind this provision is eloquent to show that there has been no other incorporation in the Act of 1914 of s. 60 for any purpose whatever. And I can see in this respect no distinction at all between s. 60 and s. 81, the nuisance clause. There is, I feel constrained to hold, no general incorporation of either section.

But serious as is the predicament in which this view of the Act of 1914 places the plaintiff, his plight has not yet, in my judgment, become so serious as Talbot J. and Lawrence L.J. thought. On the evidence of the defendants, Talbot J. gave judgment for them, and Lawrence L.J. would have done likewise. I take a different view of their position. The Corporation in my judgment have not, so far, established that in the conduct of their station there is on their part that absence of negligence which can alone relieve even them from liability to the plaintiff. With the judgment of my noble friend opposite on this matter I am in entire agreement. I think with him that the burden which lies upon the Corporation to satisfy the Court that their generating station cannot be carried on without subjecting the plaintiff to the admitted nuisance of which he complains has not so far been discharged. In my judgment the consequences in this case and in others where generating stations of great size are free of the nuisance clause would be momentous both for neighbouring owners of property and for the public health if on such evidence as has so far been adduced by the Corporation undertakers were, without redress, to be permitted to poison the air with their fumes.

My Lords, I cannot doubt that as a result of this litigation widespread attention will be directed to this increasingly important public question. This case will have served a useful public purpose if, as its result, undertakers, when, in the future they approach Parliament with proposals similar to those embodied in the 1914 Act, are required to show cause before their Bill is allowed to pass why a nuisance clause or some other adequate protection for those who may be injuriously affected by the working of these great power stations is not to be inserted therein.

I agree that the variations already announced from the Woolsack should be made in the order of the Court of Appeal. As so amended that order should, I think, be allowed to stand, and this appeal therefrom be dismissed.

Order of the Court of Appeal varied, and declared (1.) That the damages to be recoverable against the defendants should be such as have been sustained by the plaintiff up to the date when the injunction by the order awarded shall have ceased to be suspended or shall have been dissolved, whichever event shall first happen. (2.) That immediately after the injunction there should be inserted the following clauses :— " with liberty reserved to the defendants to apply to a judge of the King's Bench Division to dissolve the said injunction (a) on their establishing, if it be not admitted by the

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plaintiff, that they have exhausted all reasonable modes of preventing mischief to the plaintiff, and (*b*) *on their submitting in the future conduct of their power station to adopt and use the most effective of these modes until they have replaced them by other reasonable but more effective modes of prevention which may thereafter be discovered, and which will thereafter be adopted and used.*" (3.) *That the first suspension of the injunction should continue for one year from the date of the order of this House in lieu of one year from the date of the order of the Court of Appeal; and that subject to such variation the said order be affirmed, and the appeal dismissed. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment. The appellants to pay the costs of the appeal to this House.*

Lords' Journals, Nov. 28, 1929.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for F. E. Warbreck Howell, Town Clerk, Manchester.*

Solicitors for the respondent: *Ellis & Fairbairn.*

[HOUSE OF LORDS.]

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1930
Feb. 10.

HERBERT CLAYTON AND JACK WALLER, LIMITED, AND OTHERS } APPELLANTS;

AND

OLIVER . . . . RESPONDENT.

Contract — Theatrical Engagement — Construction — Breach — Obligation on Manager to find a Part for Actor to play—Measure of Damages—Loss of Publicity.

The appellants, theatrical producers, agreed to engage the respondent, an American actor, to play one of the three leading comedy parts in a musical play about to be produced at the London Hippodrome for six weeks certain at a salary of 55*l.* per week, and the contract contained a provision prohibiting the respondent during the continuance of his engagement from acting elsewhere without the consent of the appellants. The respondent objected that the part assigned to him was not one of the three leading comedy parts and, on the refusal of the appellants to recast him, declined to appear in the play and sued the appellants for damages for breach of contract. At the trial of the action before a judge and jury the jury found for the respondent for 1000*l.* damages for loss of publicity and for three weeks' salary, and judgment was entered accordingly. The Court of Appeal affirmed the verdict and judgment except as to the salary:—

Held, (1.) upon the construction of the contract, that it bound the appellants to give the respondent an opportunity of appearing in public in a part answering the stipulated description; (2.) that it was competent to the jury, having regard to the character of the contract, to give damages to the respondent for loss of publicity.

Fechter v. *Montgomery* (1863) 33 Beav. 22 and *Marbe* v. *George Edwardes (Daly's Theatre), Ld.* [1928] 1 K. B. 269 approved.

Turpin v. *Victoria Palace, Ld.* [1918] 2 K. B. 539 overruled.

APPEAL from so much of an order of the Court of Appeal as affirmed the verdict and judgment directed to be entered for the plaintiff (the respondent) at the trial of the action before Swift J. and a special jury.

The substantial question raised by the appeal was whether an actor who is engaged to act in a theatre and is not allowed so to act, or justifiably refuses so to act, is entitled to damages for loss of enhancement of his reputation or for loss of publicity.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, and LORD TOMLIN.

By a contract contained in two letters dated June 21 and 22, 1927, the appellants agreed to engage the respondent to play one of the three leading parts in a musical play intended to be produced at the London Hippodrome called "Hit the Deck" for six weeks certain at a salary of 55*l.* per week of nine performances, with an option to the appellants to re-engage the respondent for the run of the play. The contract is fully stated in the opinion of Lord Buckmaster.

The appellants cast the respondent for the part of Bunny Smith, and on the reading of the first act of the play the respondent complained that this was not one of the three leading comedy parts and was not a part at all. The appellants refused to recast the respondent and alleged that the part was a good performance of the contract. Thereupon the respondent declined to appear in the production and issued the writ in this action against the appellants for damages for breach of contract.

By his statement of claim the respondent, after setting out the facts above stated, alleged (para. 2) that by a collateral oral contract made shortly before June 22, 1927, the appellants agreed with the respondent that in consideration of his entering into the said engagement the appellants would secure to the respondent the fullest possible publicity by advertisements in the press and outside the theatre. The respondent further alleged (para. 6) that all parties to the contract intended that the respondent should enjoy from his employment, in addition to his salary, the publicity and reputation which would result from his playing a leading and consequently widely advertised part in an important West End production under the auspices of producers of the standing of the appellants and that by reason of the breaches complained of he had lost the said publicity and been deprived of the advantages and reputation which would have followed a successful performance of the part agreed to be played. The appellants by their defence denied the above allegations and alleged that the damages claimed were too remote.

Swift J. in summing up directed the jury that they had to decide two questions: (1.) whether the appellants, by giving the respondent a part which was not a leading comedy part, broke their contract, and (2.) if they did, what damages was the respondent entitled to, and on this head he directed the jury that they might properly include damages for loss of publicity. The jury found for the respondent for 1000*l.* for loss of publicity and 165*l.* for loss of salary, and judgment was entered for the respondent for 1165*l.*

The appellants appealed to the Court of Appeal and asked for judgment or a new trial. The Court of Appeal (Scrutton, Greer and Sankey L.JJ.) dismissed the appeal except as regards the salary, as to which no question now arose.

1929. Dec. 2, 3. *Stuart Bevan K.C.* and *Beyfus* (with them *St. John Field* and *Robey*) for the appellants. (1.) The judge misdirected the jury in telling them that the respondent was entitled under his engagement to a leading comedy part and not that he was entitled to one of the three leading comedy parts in the particular play. (2.) The respondent is not in law entitled to any damages for loss of enhancement of reputation or loss of publicity. This contention is opposed to *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ld.* (1), which, unless it can be distinguished on its special facts, was, it is submitted, wrongly decided. In that case the decision of the Court of Appeal was to some extent influenced by the fact that there was a collateral contract that the actress should be prominently advertised, and this formed the foundation of Bankes L.J.'s judgment. Here there is no proof of any such collateral contract as that alleged by the plaintiff. By the contract in question in this case the appellants agree to engage the respondent to play a specified part, there is no agreement that he shall have a right to play the part, nor is there any necessary implication of any such right. There is no difference between a contract to engage an actor and any other contract of employment. The actor is to hold himself available at any time when called upon and he is to be entitled to his salary: *Turpin* v. *Victoria Palace.* (2) A servant or

(1) [1928] 1 K. B. 269.

(2) [1918] 2 K. B. 539.

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employee who is wrongfully dismissed from his employment is not entitled to damages for loss of reputation in the trade arising from his dismissal, but the measure of damages is the payment of the salary. The general rule is that damages for wrongful dismissal are limited to the plaintiff's direct pecuniary loss: *Addis* v. *Gramophone Co.* (1) The rule as to implications in a contract is that it is not sufficient for the purpose of importing a stipulation into a contract that the implication is a reasonable one to make under the circumstances; it must be necessary in order to give the transaction such efficacy as both parties must have intended it should have: *The Moorcock* (2); *Hamlyn & Co.* v. *Wood & Co.*(3); *Bunning* v. *Lyric Theatre.* (4) In the last cited case the actual decision was that a stipulation in an engagement of the plaintiff as musical director that his name should be advertised in the newspapers implied that he should have the right to conduct. That decision proceeded on the special bargain, and does not affect the present case. *Marbe's* case (5), so far as it did not depend upon its special facts, was founded upon Lord Romilly's decision in *Fechter* v. *Montgomery* (6), but there also there was a special parol contract, and that was a case not of damages but of an injunction. But, so far as the decision proceeded upon the view that an engagement of an actor stood on any different footing from another agreement of employment, it is incorrect. *Fechter* v. *Montgomery* (6) was distinguished in *Grimston* v. *Cuningham* (7), which supports the appellants' case. Damages for loss of reputation have never been given in any case before *Marbe's*, though the question has been frequently raised in the Courts. Such damages are too remote and of such an intangible nature that they are incapable of assessment.

Sir Patrick Hastings K.C. and *P. B. Morle* for the respondent (called on on the question of misdirection only). At the trial it was alleged on behalf of the respondent (1.) that the part complained of was not one of the three leading parts in the play, and (2.) that it was not a leading comedy part at all, and the answer given was that this was going to be a leading comedy part. Having regard to the way in which the case was presented it would be an impossible situation to have a new trial.

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(1) [1909] A. C. 488, 491.
(2) (1889) 14 P. D. 64, 68.
(3) [1891] 2 Q. B. 488, 491.
(4) (1894) 71 L. T. 396, 397
(5) [1928] 1 K. B. 269.
(6) 33 Beav. 22.
(7) [1894] 1 Q. B. 125.

Beyfus replied.

The House took time for consideration.

1930. Feb. 10. LORD BUCKMASTER. My Lords, there are two main questions on this appeal—the one the construction of a contract and the other the true measure of damages for its breach.

The contract was made in the following circumstances. The respondent Barrie Oliver is a young actor, who has been appearing on the stage since 1923 first in America and then here.

The appellants Herbert Clayton & Jack Waller, Ld., and Moss Empires are theatrical producers.

On June 21, 1927, following on some conversations, the respondent wrote to the appellants a letter which began as follows :—

"23 Hertford Street,
Mayfair, W.
June 21st, 1927.

Messrs. H. Clayton & J. Waller, Ld.,
& Moss Empires, Ld.,
15 King Street, London, S.W. 1.

Dear Sirs,

In consideration of your paying me a salary of 55*l.* (Fifty-five pounds) per week of nine performances I hereby agree to play one of the three leading Comedy parts in your new Musical production at the London Hippodrome.

The engagement to commence on or about the middle of September, 1927, and to be for six weeks certain, you to have the option of re-engaging me for the run of the Play in the West End of London by giving me notice in writing during the first four weeks of the engagement."

To which they replied on June 22, in these words :—

"June 22, 1927.

We hereby agree to engage you to play one of the three leading Comedy parts in our new musical production at the London Hippodrome at a salary of 55*l.* (Fifty-five pounds) per week of nine performances. The engagement to commence on or about the middle of September, 1927, and to be for six weeks certain. . . . . Otherwise this contract to be subject to the terms and conditions contained in the Standard Contract West End."

It is on the construction of these documents that the first question depends. There was evidence of a collateral verbal agreement, but to this in the circumstances further reference need not be made.

The respondent who was the plaintiff in the action alleged that the true meaning of the contract involved an obligation on the appellants to provide him with a part answering the description in the contract, that such contract was broken, and that he suffered damage (*a*) for loss of salary (*b*) for loss of the advertisement and reputation he would have enjoyed had the contract been performed.

The case was tried before a jury, who found in favour of the respondent and assessed the damages under (*a*) at 165*l.* and under (*b*) at 1000*l.* On appeal to the Court of Appeal it was pointed out that the respondent having obtained service at an equivalent remuneration elsewhere the verdict under (*a*) could not be sustained. The Court of Appeal accordingly modified the verdict by omitting this sum, but confirmed it in other respects, and from that judgment this appeal has been brought. The construction of the contract and the verdict for 1000*l.*, therefore, are all that are now in dispute.

The construction of the contract is the first matter for consideration. If its true meaning is to be confined to a mere engagement of the respondent's services, the appellants must succeed, for in such an action the wages lost are the true measure of damage and the circumstances associated with the termination of the contract cannot be used to increase that sum.

If, on the other hand, the contract be one binding the appellants to provide a part for the respondent to play, different considerations arise and the measure of damages for breach of that bargain stand on a different footing. There is no evidence here of custom in the profession, but the character of the employment is an essential fact in determining its meaning.

The contract is based on the forthcoming production of the new musical comedy at the London Hippodrome. It is not made conditional on its production. That it is to be produced underlies the whole document and it assumes the necessary arrangements having been made. An engagement, therefore, that the respondent is " to play one of the three leading comedy parts " is to my mind something more than a mere contract on the respondent's part to render service, opportunity for such service is contemplated and agreed to be furnished. This is still further enforced by the imported conditions, one of which provides :—

" *Exclusive Services.*

4. The Artist shall be deemed to be engaged exclusively by the Manager and during the continuance of the engagement will not perform or otherwise exercise his or her talent for the benefit of any other Company Institution or person without the written consent of the Manager first had and obtained. Provided that such consent shall not be unreasonably withheld in the case of any application for the making of a gramophone or similar record."

Now if the appellants were merely accepting the respondent's service for the period of the contract and were not bound to give him work, the service obviously not occupying all his time, this provision, which would on that hypothesis prevent him from profitably using time not owed to them, would have little or no purpose. On the hypothesis, however, that he was being provided with a part it becomes sensible even if it be severe. To my mind it helps to explain the provision as to engagement and shows that there was within the contemplation of the parties the dual obligation to which I have referred. This view of the bargain does not lack authority. The case of *Fechter* v. *Montgomery* (1) is a similar case.

The written bargain there was constituted by the acceptance of a written offer dated July 28, 1862, by the lessee of the Lyceum Theatre to a leading actor "to offer you an engagement at the Lyceum Theatre for two years from January, 1863." The lessee opened the theatre but gave no part to the actor, who thereupon accepted an engagement elsewhere. The lessee instituted proceedings claiming an injunction to restrain his performance. This injunction was refused upon the ground that the plaintiff had himself broken the contract he sued to enforce. The condition alleged restraining the defendant from outside work was introduced into the contract by an alleged custom in the profession to that effect. This was accepted by the learned judge and it was partly on this that he based his conclusion. It is true that in the judgment reference is also made to some antecedent verbal discussion where the actor said he came not to be idle but to act, but it is impossible to follow the reasoning without realizing that this was not the real foundation of the judgment. The learned judge there says: "That being the state of the case, the only questions are, whether that contract has been really broken between the parties, and who was the person that first broke it, so as to entitle the other to say it is no longer binding upon him. Upon that question, it is material to regard the facts that occurred; but before I advert to them, I may notice an observation that fell from Mr. Terrell, that the contract is like an agreement for engaging a clerk, or any other person whose service you require and wish to secure. I do not assent to that view of the case; you must regard the position and situation in which the person is placed who enters into the contract. Here the defendant carries on the profession of an actor, a profession peculiar in its character and results, for it is to be observed that his success entirely depends on pleasing the public, and upon being constantly before the public. It is scarcely possible to say that he could acquire

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(1) 33 Beav. 22, 27.

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such a reputation, by being associated with Mr. Fechter, as would supply the place, which I assume, for the purpose of the argument, he might have gained by delighting a large portion of a London audience with the ability with which he acted. It is obvious that you cannot put him in the position of a clerk or other person similarly situated and compare him with such a person. It is clear that the great object of any gentleman wishing to become a distinguished actor, when he has already established a reputation in the provinces, is to have an opportunity of appearing upon the London stage and before a London audience. That is the object for which a person enters into a contract of this description, and it would be defeated if the effect of the contract is this: that if the gentleman who engaged him is not bound to employ him, and does not in fact do so, so as to give him an opportunity to display his talent and abilities, yet he is not to be at liberty to act elsewhere, unless by the permission of the gentleman who engaged him. I entertain no doubt that it was a mutual contract between the parties, and also that Mr. Fechter so understood it." It is true that the learned judge adds: "It is shewn by Mr. Barnett's letter, and by the conversation itself, that this was part of the contract entered into between them," but this I regard as nothing but confirmation of the reasoning which is independent of the verbal negotiations.

I have dealt with this judgment at length since it formed the basis of the opinion of two learned Lords Justices in the case of *Marbe* v. *George Edwardes* (*Daly's Theatre*), *Ld.* (1), and it has, I think, been misunderstood in the case of *Turpin* v. *Victoria Palace.* (2) In my opinion the judgments of the two Lords Justices in the Court of Appeal in *Marbe's* case who based their judgments on *Fechter* v. *Montgomery* (3) rightly interpreted the judgment in this case, and the passage which I have already quoted is, in my opinion, an accurate exposition of the principles applicable to the construction of the contract then under consideration. The contract in the present case is in its essence the same as that in *Fechter* v. *Montgomery* (3),

(1) [1928] 1 K. B. 269.
(2) [1918] 2 K. B. 539, 548.
(3) 33 Beav. 22, 27.

but the condition there implied restraining the actor from performing elsewhere is here plainly expressed.

In the case of *Turpin* v. *Victoria Palace* (1) the learned judge fell into the error of thinking that because in the case of *Fechter* v. *Montgomery* (2) the relief sought was by way of an injunction, it did not apply, but the construction of the contract is the same whether the remedy for its breach be by way of injunction or damages, and it is only on the distinction drawn between such a contract as the one then under consideration and the ordinary contract of service that the authority is of any value. In contrast with this decision the case of *Turner* v. *Sawdon & Co.* (3) is instructive. There an agreement to "engage and employ" as a salesman was held to be merely a contract to serve and that the word "employ" did not throw on the employer any obligation beyond that of master and servant, but that decision was due to the fact that, regard being had to the occupation, the word "employ" though capable of two meanings meant in that case only to retain in the service of the employer. This is made clear in the judgment of Stirling L.J., who says: "In the case of an actor who accepts an engagement, it may be an important consideration with him to have an opportunity of displaying his abilities before the public, and it may be there is an implied obligation on the part of the master to afford such opportunity," and he refers to and relies on *Fechter* v. *Montgomery* (2) as authority for the proposition. I agree with this view of Stirling L.J. and I think, entirely independently of the verbal conversation, *Fechter* v. *Montgomery* (2) was rightly decided.

The next question is whether the contract was broken by the appellants, and here I agree with Scrutton L.J. that the matter was not placed as accurately as could be desired before the jury, due, no doubt, to some unfortunate confusion in the presentation of the case.

The true meaning of the contract is that the respondent was to have one of the three leading comedy parts in the play called "Hit the Deck." This was properly alleged

(1) [1918] 2 K. B. 539, 548.
(2) 33 Beav. 22.
(3) [1901] 2 K. B. 653, 659.

in the pleadings, but the case was presented on the ground that such a part as that assigned to the plaintiff could not be called a leading comedy part in anything.

Sir Patrick Hastings, on behalf of the respondent, said that this view was the only thing really discussed, but this is certainly an over emphasis of what occurred. Both views were clearly presented by the evidence but the more general view was the one urged on behalf of the plaintiff, and it nowhere appears that this was regarded as irrelevant. None the less, I think the summing up should have been far more exact in its definition of the issue, and more limited in its scope. Unless, however, it is plain that injustice might reasonably be expected to have resulted from an irregularity in summing up, a new trial ought not to be granted, for it is the substance and not the letter that should be regarded.

One of "the three leading comedy parts" assumes that there are three leading comedy parts in the play, and though this must be regulated by looking at the play itself, yet in my opinion it is not satisfied by saying: "Here are the best three comedy parts—you shall have one of them." The part must be capable of satisfying the qualification of being a genuine leading comedy part even though judged in relation to the play, and though I think this ought to have been so put to the jury, I regard their finding as a verdict that the condition was not satisfied on any view, and examination of the part itself is an ample justification of their opinion. Making all necessary allowances for the fact that the kind of humour of such a play seems melancholy in print, the part assigned to the plaintiff is so trivial that even in relation to this play the verdict is fully warranted. Attempts were made by the appellants to justify by suggesting that the written part was only a kind of seed from which a full grown part might spring, and that the respondent was premature in writing as he did two days after the first meeting that he had no alternative but to decline to appear, but in my opinion the part ought to have satisfied the conditions when given to the plaintiff at the rehearsal and this it failed to do.

No other part was offered and the result is that the appellants broke their contract. The next question is what was the measure of damage? It is true that as a general rule the measure of damage for breach of contract is unaffected by the motives or manner of its breach. What are known as vindictive or exemplary damages in tort find no place in contract nor accordingly can injury to feelings or vanity be regarded. The action of breach of promise of marriage is an exception to the general rule, for, strictly assessed, the loss to a woman as a husband of a man who declines with insult to marry her might be assumed to be nil, but that is not the way such damages are determined.

In the present case the old and well established rule applies without qualification, the damages are those that may reasonably be supposed to have been in the contemplation of the parties at the time when the contract was made, as the probable result of its breach, and if any special circumstances were unknown to one of the parties, the damages associated with and flowing from such breach cannot be included. Here both parties knew that as flowing from the contract the plaintiff would be billed and advertised as appearing at the Hippodrome, and in the theatrical profession this is a valuable right.

In assessing the damages, therefore, it was competent for the jury to consider that the plaintiff was entitled to compensation because he did not appear at the Hippodrome, as by his contract he was entitled to do, and in assessing those damages they may consider the loss he suffered (1.) because the Hippodrome is an important place of public entertainment and (2.) that in the ordinary course he would have been "billed" and otherwise advertised as appearing at the Hippodrome. The learned judge put the matter as a loss of reputation, which I do not think is the exact expression, but he explained that as the equivalent of loss of publicity and that summarizes what I have stated as my view of the true situation.

As to the amount, that was for the jury; the damages appear to me extravagant just as they were in *Marbe's* case (1), but they are not so extravagant as to vitiate the verdict.

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(1) [1928] 1 K. B. 269.

I agree with the judgment of Scrutton L.J.; this case might have been more carefully handled at the trial, but I cannot find sufficient ground of complaint to warrant this House deciding that it should be tried again.

VISCOUNT DUNEDIN. My Lords, I concur and have but little to add. It was explained to us at the Bar that this appeal was avowedly brought to test whether the case of *Marbe* v. *George Edwardes (Daly's Theatre), Ld.* (1), was rightly decided. I think it was rightly decided. I do not feel that any generalization is possible, or that each and every contract would be found to fit a general rule. I think each contract as it arises must be considered by itself in order to see what are the prestations which each party is bound to perform. Considered from that point of view I think that in this case the appellants contracted not only to pay the respondent a salary, but to give him the opportunity of appearing before the public in a part which answered to the stipulated description. I do not repeat all my noble friend has said as to the failure of the part offered to satisfy that description.

I may be allowed to say that the exact words in which my noble friend expressed what it was competent for the jury to consider were agreed on after consultation between all the noble Lords who heard the case: but I agree with my noble friend in thinking that after all they are only the application to the present case of the well known rule of *Hadley* v. *Baxendale.* (2)

LORD WARRINGTON OF CLYFFE. My Lords, I agree.

LORD BUCKMASTER. My noble friends Lord Blanesburgh and Lord Tomlin desire me to say that they agree with the opinion I have read.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 10, 1930.

Solicitors for the appellants: *Burton & Ramsden.*
Solicitor for the respondent: *W. D. Shearly Sanders.*

(1) [1928] 1 K. B. 269.
(2) (1854) 9 Ex. 341.

[HOUSE OF LORDS.]

H. L. (Sc.)* 1930 Feb. 6.

COMMISSIONERS OF INLAND REVENUE APPELLANTS;

AND

MILLER . . . . RESPONDENT.

Revenue—Super-tax—Direction by Testator to Trustees to allow his Wife to occupy Mansion-house and Policies free of Rent and Taxes—Liability of Widow as Occupier on the Terms of the Trust to Assessment to Super-tax on Sums representing the Annual Value of the Property and Payments made by the Trustees for Rates—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 5, *sub-s.* 1, *s.* 19; *Sch. A, No. VII., rr.* 1, 2; *Sch. B, r.* 4.

A testator by his trust disposition and settlement directed his trustees to hold and retain his lands and estates at M. and to pay all duties and burdens and the cost of repair and maintenance and, in the event of his death without issue, to allow his wife "to occupy and possess during her lifetime free of rent or taxes both landlord's and tenant's" the mansion-house of M. with the offices and furniture and other effects therein and the game on his estates. The testator having died without issue, his widow, under the terms of the trust, occupied the mansion-house and lands at M. during the year ending April 5, 1920.

On an appeal by her to the Commissioners for the Special Purposes of the Income Tax Acts against an additional assessment to super-tax for the year ending April 5, 1921, on a sum representing (*a*) the annual value of the mansion-house and lands, and (*b*) certain payments by the trustees for rates and wages, the Commissioners upheld the additional assessment, but their determination was reversed by the First Division of the Court of Session as the Court of Exchequer in Scotland:—

Held, that as occupier in her own right of the mansion-house and lands the widow was rightly assessed on the annual value of her free enjoyment as being income liable to super-tax. The liability of the occupier to super-tax is not determined by the question whether he has power to let or otherwise to convert the annual value into money.

Shanks v. *Inland Revenue Commissioners* [1929] 1 K. B. 342 approved.

Tennant v. *Smith* [1892] A. C. 150 distinguished.

M'Dougal (or *Inland Revenue*) v. *Sutherland* (1894) 21 R. 753; 3 Tax Cas. 261 and *Inland Revenue Commissioners* v. *Wemyss* 1924 S. C. 284 disapproved.

Held, further, that the money paid by the trustees for rates was paid for the benefit of the widow and ought to be included in her total income for super-tax purposes.

Decision of the First Division of the Court of Session in Scotland 1928 S. C. 819 reversed.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, and LORD TOMLIN.

APPEAL from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts. (1)

During the year ending April 5, 1920, the respondent was in occupation of the mansion-house of Manderston and the lands pertaining thereto under the terms of the trust disposition and settlement of her late husband, and under the authority of the said trust disposition and settlement her husband's trustees paid the rates on the mansion-house and policy parks and also the wages of the foresters employed in connection with the establishment.

The material clauses of the trust disposition and settlement are set out in the opinion of Lord Buckmaster and are summarized in the headnote.

The respondent appealed to the Commissioners against an additional assessment to super-tax for the year ending April 5, 1921, on a sum representing (1.) the annual value of the mansion-house and policy parks, and (2.) moneys expended by the trustees in payment of the local rates thereon and in payment of the foresters' wages.

The Commissioners held that the respondent had a life-rent use of the property and fixed the additional assessment at 1250*l.*

The questions of law submitted for the opinion of the Court were: (1.) Whether the respondent had a life-rent use of the said mansion-house and lands and was bound to include in calculating her liability to super-tax the assessments made thereon under Schedules A and B of the Income Tax Act. (2.) Whether she was also bound to include the sums mentioned as paid by the trustees with the income tax applicable thereto.

The First Division, by a majority (the Lord President, Lord Sands and Lord Blackburn; Lord Morison dissenting), answered these questions in the negative and reversed the determination of the Commissioners.

Upon the present appeal the appellants gave up their claim in respect of the foresters' wages.

(1) 1928 S. C. 819.

1929. Nov. 25, 26. *Latter K.C.* and *A. N. Skelton* (of the Scottish Bar) (*Sir William Jowitt A.-G.* and *Reginald Hills* with them) for the appellants. The ground of the decision of the majority is that because the respondent was not entitled to let and turn her interest into money she was not bound to include the annual value in her return for super-tax. But the power to let is not the true criterion. Inasmuch as the respondent enjoyed as of right the annual value of the property she is the person liable to pay income tax on it, and super-tax being an additional duty of income tax levied on the income of the individual, the total income for super-tax includes this income, without regard to the question whether the respondent had power to let and turn her interest into money. The tax under Schedule A, like that under the other Schedules, is a tax on income. For the purposes of this Schedule the annual value, not the rent, is the income, the rent being the measure of annual value only in the case of a rack rent. The person liable for the tax on the annual value and prima facie in the enjoyment of it is the occupier, but, in so far as he does not enjoy the whole annual value because he has to pay rent, he may pass on the tax to the person getting the rent, for to the extent of the rent the recipient is getting the annual value. If the rent is less than the annual value, then the annual value to the extent of the surplus is the income of the occupier, each taxpayer being affected by the assessment in respect of the property to the extent to which the property gives him part of the annual value: *London County Council* v. *Attorney-General* (1); *Moore* v. *Drughorn* (2); *Inland Revenue Commissioners* v. *Fargus* (3); *Lord Tollemache* v. *Inland Revenue Commissioners* (4); *Shanks* v. *Inland Revenue Commissioners.* (5) In the last mentioned case, which was since the decision of the Court of Session in the present case, the Court of Appeal declined to follow the decision of the majority and adopted the

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(1) [1901] A. C. 26, 35.

(2) [1922] 2 K. B. 492, 497, 498; [1924] A. C. 53, 56–7.

(3) (1926) 10 Tax Cas. 665.

(4) (1926) 11 Tax Cas. 277, 285.

(5) [1929] 1 K. B. 342, 351.

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reasoning of Lord Morison. That case has since been followed in *Sutton* v. *Inland Revenue Commissioners.* (1) [They also referred to *Drummond* v. *Collins* (2); *Mackenzie* v. *Johnstone* (3); *Milne's Trustee* v. *Milne* (4); *Donaldson's Executors* v. *Inland Revenue Commissioners.* (5)] The payments made by the trustees for rates were made directly for the respondent's benefit and must be treated as part of her total income for super-tax purposes.

Douglas Jamieson K.C. (of the Scottish Bar) (with him *Neil A. MacLean* (of the Scottish Bar) and *A. Ralph Thomas* (of the English Bar)) for the respondent. There is no question that the annual value is taxable under Schedule A; the sole question is whether it is the trustees' income or the respondent's. The tax is charged in respect of the property in lands and is estimated on the annual value. Property denotes ownership, and the tax chargeable under Schedule A is a tax on the income of the owner and not on the income of the occupier. The respondent having merely the privilege of personal occupation cannot derive any profit or gain out of the mansion-house and is not taxable on the annual value. She is not the owner and the annual value is not her income: *Tennant* v. *Smith.* (6) Ever since 1894 the Scottish Courts have taken the view that the test to be applied is the test of ownership. In *M'Dougal* (or *Inland Revenue*) v. *Sutherland* (7) it was held on a question of deduction that the annual value of a manse occupied rent free by a minister of the Free Church of Scotland was not included in his income, because his right to occupy was not convertible into money and because he was not the proprietor of the manse. In *Corke* (or *Inland Revenue*) v. *Fry* (8) an opposite conclusion was arrived at in the case of a minister of the Established Church, because he was held to be the owner and his right was not merely a right of personal residence, but could be turned into money. Those cases show that nothing is to be treated as income unless it can be turned into money. It is not the use or enjoyment which is taxed but the income or profits derived from ownership, *Inland Revenue Commissioners* v. *Wemyss* (1) proceeds on the same principle. *Mackenzie* v. *Johnstone* (2) is distinguishable, because there the widow's interest was held to be not a mere right of occupancy, but a liferent. *Lord Tollemache's* case (3) is contrary to *Tennant* v. *Smith* (4) and was wrongly decided. *Shanks's* case (5) proceeded entirely on occupation. But occupation which is so derivative and subordinate as that of the respondent is not the occupation of the physical occupier, but of the owner. The trustees have the right to use and occupy the property for every other purpose than that merely of personal residence; as trustees they are charged with a continuing trust in respect of the subjects in question and they are the true occupiers.

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(1) (1929) 45 Times L. R. 565.
(2) [1915] A. C. 1011.
(3) [1912] A. C. 743.
(4) 1920 S. C. 456, 460.
(5) (1927) 13 Tax Cas. 461.
(6) [1892] A. C. 150.
(7) 21 R. 753; 3 Tax Cas. 261.
(8) (1895) 22 R. 422; 3 Tax Cas. 335.

The House took time for consideration.

1930. Feb. 6. Lord Buckmaster. My Lords, the circumstances that have given rise to this appeal are special and need to be summarized in order that the point at issue may be made plain.

Sir James Miller, by a trust disposition and settlement dated December 4, 1901, directed his trustees to hold his lands and estates at Manderston in the county of Berwick to pay all duty and burdens and the cost of repair and maintenance and in the event of his death without issue to "allow his said wife to occupy and possess during her lifetime free of rent or taxes both landlord's and tenant's, the said mansion-house of Manderston and offices and furniture and other effects therein, and the game on his said lands of Manderston and others, and the other subjects of which he had directed his said wife to have the liferent in the event of his death survived by a daughter: And he directed his trustees during the liferent of his said wife to pay the wages of the foresters employed in connection with the said establishment, the wages of the gamekeepers and gardeners to be paid by his said wife."

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(1) 1924 S. C. 284; 8 Tax Cas. 551.
(2) [1912] A. C. 743.
(3) 11 Tax Cas. 277.
(4) [1892] A. C. 150.
(5) [1929] 1 K. B. 342.

Sir James Miller died in 1906 without issue, and Lady Miller by virtue of her rights under the trust disposition occupied and possessed the mansion-house and lands at Manderston during the year ending April 5, 1920. For the said year the assessments under Schedules A and B of the Income Tax Acts were as follows :—

	£	s.	d.
"Policy Parks, Schedule A	165	10	0
Policy Parks, Schedule B	452	0	0
Part farm, Briery Hill, Schedule B . .	89	5	0
Mansion-house, Schedule A	319	10	0"

No question arises as to the liability in respect of the Briery Hill subjects, which were rented by Lady Miller from the trustees.

The trustees under the authority, above set out, of the trust disposition and settlement, paid the following sums during the said year out of income received by them :—

	£	s.	d.
Foresters' Wages	60	0	0
Rates on Mansion-house	65	0	0
Rates on Policy Parks	32	0	0

In assessing Lady Miller for super-tax for the year ending April 5, 1921, none of the items above mentioned under Schedules A and B were included, nor any of the above payments, and an additional assessment was made for that purpose. Against such additional assessment, Lady Miller appealed to the Commissioners for Special Purposes, who rejected her appeal, but on further appeal to the Court of Session she was more successful, for they reversed the decision of the Commissioners, Lord Morison dissenting, and from their interlocutor of July 7, 1928, the Commissioners of Inland Revenue have come before this House.

That the original assessments for income tax under Schedules A and B were correct was not originally disputed, though it is doubted by the Lord President, but it is urged that Lady Miller's right to occupy is no part of her income and that its equivalent in money value cannot be regarded for super-tax.

This argument has found favour with the Court of Session, but their judgments are in part influenced by decisions some of which do not bind this House, in part by the consideration of whether Lady Miller's interest was that of a life rent, and partly by the view on more general grounds that her interest was not income, while in Lord Blackburn's opinion in determining liability to super-tax "the question must always be whether the right of occupation gives the occupier any right to earn money from the subjects." I will reserve for the present the consideration of the various cases; it is well to examine this matter in the first place apart from their assistance.

The discussion as to whether the interest of the respondent can properly be called a liferent does not appear to me to help the solution and it is unfortunate that the special case defined the question under this head. It is not the name by which the estate is described that matters, nor its legal incidents except so far as they are relevant for the purpose of determining whether they are such as to involve the liability in dispute. Fortunately the case was argued on the broader basis in the Court of Session, though its more limited aspect received closer attention than in the circumstances it required.

The real question is whether the assessable value of the property in question is to be regarded as income for the purposes of the tax.

So far as Schedule A is concerned the matter, but for the Lord President's judgment, seems reasonably plain. The tax is charged upon "hereditaments and heritages in the United Kingdom for every twenty shillings of the annual value thereof." As Lord Morison points out, it is not a tax upon the interests of the person in possession but it is charged on and payable by the occupier for the time being and he according to his interest bears or passes it on by deduction pro tanto from the rent he pays.

In the present case that the respondent was the occupier and was consequently chargeable under the statute with the tax, though doubted by the Lord President, is found in the words of the special case "she did in fact occupy and possess the mansion-house" for the year in question, and that she was entitled to have the taxes paid by the trustees does not affect her position in this respect. Her occupation was in her own right and she was not occupying as the representative of the trustees. This being so, the next question is whether the annual value of the house is to be brought into computation for purposes of super-tax. The determination of income for this purpose is, as is well known, to be "estimated in the same manner as the total income from all sources is required to be estimated in a return made in connection with any claim for a deduction from assessable income," and the "income arising from the ownership of lands . . . . shall . . . . be deemed to be the annual value thereof estimated in accordance with the rules applicable to Schedule A."

Now in the case of a person occupying his own house, the annual value is income for purposes of the Act. If he occupies under a beneficial lease the difference between the rent he pays and the annual value is again his income and must be included in his super-tax return (*Drughorn* v. *Moore* (1); *Inland Revenue Commissioners* v. *Fargus* (2)), and this, not because he could let or sub-let it, for, under a beneficial lease, he might be subject to an absolute unqualified restriction against letting or assigning, which, until recent legislation, would have deprived him of any means of obtaining income from the property without his landlord's consent. The same position would result if without the intervention of trustees a house was devised by will to the use of a named beneficiary until he conveyed let or otherwise parted with the right to possession thereof and upon the happening of such event or on his death, whichever first occurred, the house was devised to some other beneficiary. Unless it can be said that in such a case no one is liable for the tax the liability must fall on the first devisee during his interest although he cannot make any profit out of it.

(1) [1924] A. C. 53.

(2) 10 Tax Cas. 665.

Nor can the intervention of trustees alter the position of the beneficiary or devisee. If authority were needed for this view it is to be found in *Mackenzie* v. *Johnstone*. (1) Again, even where trustees are legal owners not in occupation, they cannot be made chargeable with the tax unless under r. 9 of No. VII. of Schedule A they can establish their position as landlords and obtain the General Commissioners' consent. Without such consent the occupier is chargeable with the tax.

It is true that the trustees may in the present case enter the house for purposes of repair or making additions to the furniture, and the grounds for other specified objects; such powers might be reserved to a landlord under a beneficial lease, but they could not enable a tenant to escape liability for the tax to the extent of his beneficial interest, and I cannot assent to the view that such powers render the trustees the occupier within the meaning of No. VII., rr. 1 and 2. Unless therefore it could be said that in such instances there was no property to tax, the annual value of the lands must be the income taxable under Schedule A without regard to whether the occupier could receive that value by other means than occupation, and such income would properly be included in a claim for abatement.

The Lord President found himself unable to accept this view. In his opinion " the body of Sir James Miller's trustees —and not the appellant—is ' the occupier ' of the mansion-house and policy parks within the meaning of No. VII., rules 1 and 2, of Schedule A. The trustees, and not the appellant are occupiers of those heritages, and have the right to ' occupy ' and ' use ' them for every possible purpose including that of allowing to the appellant the privilege of personal residence therein."

I find it difficult to agree with this conclusion, as it appears to me to ignore Lady Miller's interests under the will, and these clearly include a right to occupy, which the trustees would be compelled by the Court to recognize.

Occupation in the ordinary sense could never be enjoyed by the trustees. A right to enter is not a right to occupy.

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(1) [1912] A. C. 743.

The word "occupier" as used in the statute has its ordinary meaning, and the ascertainment of whether a person is an occupier or not is a question of fact and not of law. In my opinion Lady Miller was rightly found to be the occupier and was rightly charged with tax as such occupier, the annual value of her beneficial enjoyment was income for the purposes of the Act—was of a nature to be included in a claim for abatement—was liable to super-tax.

This appears to me to be the direct and natural conclusion from the words of the Act, but in course of time there have been many encrustations upon the statute to which attention must be paid. No fewer than fifteen cases were quoted in the course of argument and some deserve attention.

The first and by far the most important is the case of *Tennant* v. *Smith.* (1) In that case Alexander Tennant, the agent for the Bank of Scotland at Montrose, resided on part of the bank premises which it was part of his duty to occupy. The whole of the bank premises were assessed under Schedule A as against the bank; neither the whole nor any part of the tax was, or was sought to be, recovered from Alexander Tennant under that Schedule. The total income, excluding any advantage from residing on the premises, was 374*l.*, and he accordingly sought abatement on the ground that his income was under 400*l.* This claim was refused upon the ground that Tennant ought to be assessed either under Schedule D or Schedule E for a sum of 50*l.*, as representing the value of his residence on the bank premises. It was this claim on the part of the Inland Revenue authorities that was refused by this House. It is impossible to examine the judgments closely without realizing that they were based upon the fact that, whatever advantage the agent might have enjoyed from his residence, it could not possibly be made the subject of assessment under Schedules D and E. As Lord Watson said: "The appellant is not a proprietor, neither is he an occupier within the meaning of Schedule B. The bank are the only occupiers. . . . The appellant does, no doubt, reside in the building, but he does so as the servant of the bank and for the purpose of performing the duty which he owes to his employers. His position does not differ in any respect from that of a caretaker or other servant, the nature of whose employment requires that he shall live in his master's dwelling-house or business premises instead of occupying a separate residence of his own." Again, Lord Macnaghten says this: "Property . . . . in the house he has none, of any sort or kind. He has the privilege of residing there. But his occupation is that of a servant, and not the less so because the bank thinks proper to provide for gentlemen in his position in their service accommodation on a liberal scale. It is clear, therefore, that the appellant is not chargeable under Schedule A in respect of the bank house, or liable to pay the duty as occupying tenant. The bank and the bank alone is chargeable and liable to pay." It is unnecessary to investigate this decision further, but it is well to add that, in referring to phrases used by the other members of your Lordships' House who heard the case, such as those relating to the inability of the agent to make a profit out of his occupancy, these phrases must all be read in relation to the central facts and features of the case to which I have referred. To my mind, therefore, this case in no way governs the present. But it is at least useful to keep in mind that Lord Macnaghten distinctly stated that income in the Income Tax Acts certainly means more than income properly so described; it includes more than profits and gains chargeable under the last three Schedules of charge, it includes the annual value of property chargeable under Schedule A and the annual value of the occupation chargeable under Schedule B; while, finally, the case shows that there is no distinction whatever between the meaning of income for the purposes of abatement and that for purposes of taxation—a matter of some importance since liability to super-tax is determined with reference to claims for abatement.

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(1) [1892] A. C. 150, 158, 162.

The case that is closer to this and causes more difficulty is the case of the *Inland Revenue Commissioners* v. *Wemyss*. (1) In that case there was a right of occupation which arose in favour of the respondent if the testator's second wife released her life rent, and in that case it was provided that the respondent should during the subsistence of a trust made subject to certain conditions be entitled to occupy the castle so long as the trustees kept it unlet; and it was held by the Lord President that the trustees were, in the circumstances, the true owners and possessors and occupiers of the subjects. It is plain from the judgments that one of the circumstances that influenced some of the learned judges in their opinion was the fact that the respondent had no power to let. This, however, did not convince Lord Sands, who states definitely: "I do not think that a tenant in personal possession could be heard to say, 'I am not the statutory occupier. I have not "the use" of the premises because I cannot sub-let them. I cannot collect civil fruits.'" I think it is plain that, had the learned judge been sitting alone, he would have come to a different conclusion from that which he reluctantly expressed. I think his hesitation was well justified and that the reasoning which he gives in its explanation is sound and ought to be followed. The case of *Shanks* v. *Inland Revenue Commissioners* (1) is indistinguishable from the present, and the position is shortly and exactly stated in the judgment of Russell L.J.

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(1) 8 Tax Cas. 551, 586.

It does not appear to me necessary to consider closely further authorities. Those to which I have referred contain the substance of the decided matter upon which the respondent chiefly relies, but for clearness it may be well to state that in my opinion the case of *Corke* (or *Inland Revenue*) v. *Fry* (2) was right in the result but wrong so far as it made the power to let the rigid exclusive test of liability. The case of *M'Dougal* (or *Inland Revenue*) v. *Sutherland* (3) was wrongly decided. The policy parks under Schedule B stand in the same position and the rates and taxes follow the other property. With regard to the foresters' wages, there is not sufficient information to enable judgment to be passed upon this claim and it was abandoned by the Inland Revenue.

(1) [1929] 1 K. B. 342.
(2) 22 R. 422.
(3) 21 R. 753.

Upon the whole, therefore, I am of opinion that the judgment of Lord Morison is an accurate exposition of the law and, subject to the modification mentioned, this appeal must succeed.

I am asked by my noble and learned friend Lord Blanesburgh to say that he concurs in this judgment.

Viscount Dunedin. My Lords, much of the judgments of the Court of Session is occupied with the discussion of whether the right which Lady Miller took under the will of her husband as to the house, etc., of Manderston, was a "proper" life rent. I do not think this discussion helps the question to be determined. I should be prepared to say that no life rent was a "proper" life rent which was not a feudal life rent, and that is not the quality of Lady Miller's right. But the question remains whether what Lady Miller got, by whatever name you call it, was or was not income in the sense of the Income Tax Act. Now that the benefit which a person gets from lands which, for taxation purposes, falls under Schedule A can be and is income was settled by the judgment of this House in the case of *London County Council* v. *Attorney-General.* (1) That that income is not dependent on the fact whether hard cash comes to the holder of the property is apparent in every case where, e.g., a person occupies a mansion-house and grounds which, so far from bringing in money, cost much money to keep up and which are never let. Nor do I think it can possibly be dependent on the fact whether the person holding the property can or cannot turn it into a money producing subject by letting it to others. The value for Schedule A is, in cases where the Surveyor of Public Taxes is taken as the assessor under the Valuation Act, the value entered in the Valuation roll, and in other cases it is as the Surveyor of Taxes may fix, subject to appeal against his decision: 20 & 21 Vict. c. 58; *Menzies* v. *Solicitor of Inland Revenue.* (2) I am naturally speaking here of Scotland, as this is a Scotch case. The framer of the valuation roll only inquires whether the property is let, not whether it can be let, and that only to see if the rent for which it is let is a fair value. Take the case of a property let for a ridiculously small sum for a term of years. That is not, in the phraseology of the statute, let at a rack rent. That sum would not be entered as the value in the valuation roll made up as aforesaid, but a sum at which if it were free it might be let, and yet the owner in that case could not let it for that sum for he had already let it at the smaller sum. I am therefore of opinion that the distinction taken between what might be let and what might not be let is not a relevant distinction, and the *Free Church Manse* case (1) which was distinguished from the *Established Church Manse* case (2) on that ground was wrongly decided.

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(1) [1901] A. C. 26.

(2) (1878) 5 R. 531.

The whole argument of the respondent has depended on her introducing the word " owner " into the words of Schedule A. " Owner " is not mentioned in Schedule A, and one can see at least one very good reason why it should not be so. The Income Tax Act was framed to apply to England and Scotland alike, but if the word " owner " had been introduced it would have led at once to confusion. A person who, in London, holds a fifty years' lease from the Duke of Westminster is commonly called the owner of his house, but in Edinburgh a person in the same position would not be called the owner. That term is reserved for him who is infeft, ordinarily in Edinburgh the feuar, but equally of course the proprietor who holds from the Crown where there has been no sub-infeudation.

The tax due under Schedule A is not imposed on the owner ; it is imposed on the occupier. It is quite true that in certain cases he may have a right to relief by way of deduction from what he has to pay to the owner, but when he has no such right the tax remains where it falls. That is the case here. Lady Miller is occupier of the house, etc., and must pay tax under Schedule A for the subjects of her occupation. She has no right of relief against the trustees because she owes them nothing from which she can deduct what she has to pay, and therefore it is her income and must be taken in computo in measuring the amount on which her super-tax is to be reckoned. The fact that under the provision of the will the trustees are then out of their general fund bound to recoup her, and that consequently for convenience' sake the trustees may pay the tax direct makes no difference. The liability to the Crown is really her liability.

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(1) *M'Dougal* (or *Inland Revenue*) v. *Sutherland* 21 R. 753.

(2) *Corke* (or *Inland Revenue*) v. *Fry* 22 R. 422.

I have already said that I think the *Free Church Manse* case (1) ill decided. I think the same of the *Wemyss* case. (2) The *Bank* case (3), which was in this House and therefore is binding on me, has, I think, been only misunderstood. The whole point was that it was found as a fact that the occupation of the bank by the agent was not truly his occupation, but the bank's occupation and the tax due under Schedule A was no more leviable on the agent than it would have been on a caretaker who lived on the premises to keep them clean.

I therefore concur in the motion made by the noble Lord on the Woolsack.

LORD WARRINGTON OF CLYFFE. My Lords, but that we are differing from the views expressed by the majority of the judges in the First Division of the Court of Session and are proposing to overrule certain previous decisions of the Court of Session, I should have contented myself with a simple concurrence with the opinion of my noble and learned friend on the Woolsack; but under the circumstances I think it desirable to state as briefly as possible the reasons for such concurrence.

The main question in the appeal is whether for the purposes of super-tax the respondent is bound to include as part of her income for the year preceding the year of assessment the amounts at which she was assessed for income tax under Schedules A and B of the Income Tax Act in respect of her occupation under the trust disposition and settlement of her deceased husband of a mansion-house and lands at Manderston in the county of Berwick.

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(1) 21 R. 753. (2) 1924 S. C. 284.
(3) *Tennant* v. *Smith* [1892] A. C. 150.

A minor question is raised whether she is also bound to include certain payments for rates in respect of the same hereditaments made by the trustees of the disposition and settlement in pursuance of the provisions thereof.

Both these questions were decided against the Crown by the majority in the First Division; the Commissioners of Inland Revenue appeal.

By the said trust disposition and settlement, and in the event which has happened of the testator having died without issue leaving his wife surviving, the trustees were directed to hold and retain his lands and estates of Manderston and others and out of the income of his estate generally, including the said lands and estates, to make certain payments therein provided for, and in particular all public parochial and local burdens of every kind exigible furth of his heritable estate, and to allow his wife the respondent to occupy and possess during her lifetime the mansion-house of Manderston and the other subjects therein mentioned including in particular the policy parks in respect of which the assessments to income tax under Schedules A and B respectively were made, and he directed his trustees "during the life rent" of his said wife to pay the wages of the foresters employed in connection with the establishment.

Under these trusts the respondent did in fact during the year ending April 5, 1920, being the year preceding the year of assessment, occupy and possess the mansion-house and lands the subject of the assessments to income tax under Schedules A and B now in question.

It is unnecessary to repeat the several statutory provisions relating to the income tax under Schedules A and B and to super-tax, and I propose to state what in my view, bearing in mind the several authorities on the subject, is the true result of those provisions.

Income tax under Schedule A is a tax not upon rent but upon the annual value of the hereditaments in respect of the property in which it is charged. If lands are let at a rack rent the annual value is measured by such rent, in other cases by the rack rent at which they are worth to be let by the year. The tax is to be charged on and paid by the occupier—namely, the person having the use of the hereditaments. If the hereditaments are held by the occupier at a rack rent he is entitled to deduct the amount of the tax on payment of his rent. If they are held at a rent less than a rack rent he is entitled to deduct from such rent the proportionate part of the tax appropriate thereto. If they are not subject to any rent then the occupier bears and pays the entire tax. He does so because in such case he is the only person in enjoyment of the annual value. On this point I entirely agree with the opinion expressed by Lord Sands. (1) It seems to me to follow on principle, and for the moment without reference to authority, that in the case last mentioned the annual value is, for the purposes of the Income Tax Act, to be treated as income of the occupier, and I feel sure that on this point also I am in agreement with Lord Sands. He seems to have come to a conclusion to the contrary only because he felt himself bound by authority to do so.

The majority of the judges in the Court of Session appear to have based their conclusion on the view that unless the annual value is capable of conversion into actual money, either by letting or otherwise, it cannot be treated as income of the occupier, and further that in the present case on the construction of the settlement it was not capable of such conversion. Thinking as I do that there is no ground in law for their general proposition, I do not think it necessary to decide the point on the construction of the particular settlement, and so far as I am concerned the point remains open.

Independently of authority therefore I should come to the conclusion that so far as the assessment under Schedule A is concerned the contention of the Crown is correct.

As to the assessment under Schedule B I can find no material distinction, and the same result follows.

I now turn to the authorities.

It is admitted by counsel for the respondent that there is no authority in England which supports his contention.

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(1) 1928 S. C. 842.

But I think that the English authorities not only do not support but directly negative his contention. The most recent case is that of *Shanks* v. *Inland Revenue Commissioners* (1), a decision of the Court of Appeal. I refer particularly to the judgment of Russell L.J., which in my opinion concisely and correctly states the law on the subject.

The respondent, however, relies on certain Scotch cases, and these it is therefore necessary to consider. The first is *Tennant* v. *Smith*. (2) I cannot help thinking that the decisions in the subsequent cases are to some extent the result of an erroneous view as to the nature of this case. The question there was whether the income from all sources of a servant of a bank includes as part of his emoluments under Schedule E the annual value of a portion of the bank premises in which as a servant of the bank he was required to reside. The bank itself was assessed in respect of the whole of the premises under Schedule A and paid the tax. It was held that nothing in respect of the annual value of the portion occupied by him of the bank premises could be treated as income under Schedule E. This case had nothing to do with Schedule A, and in addressing this House Lord Macnaghten recognized that income from all sources includes the annual value under Schedule A, and the annual value chargeable under Schedule B. This case is no authority in support of the respondent's case.

The next case is *M'Dougal* (or *Inland Revenue*) v. *Sutherland*. (3) The question there was whether the annual value of the manse occupied by a Free Church minister by virtue of his office ought to be included in his income from all sources for the purposes of a claim to an abatement. It was held that it ought not, the decision being determined by the view that, inasmuch as in the opinion of the Court the minister could not let the manse, or otherwise turn the annual value thereof into money, such annual value was not part of his income. In my opinion this case was incorrectly decided. I have already pointed

(1) [1929] 1 K. B. 342.
(2) [1892] A. C. 150.
(3) 21 R. 753; 3 Tax Cas. 261.

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out that in my view the annual value is taxed as against the occupier, in cases where he has no recourse to any other person, not as a mere collector but as a taxpayer, and that such annual value is therefore necessarily treated for the purposes of the Act as his income though he may not actually receive any money in respect thereof.

In *Corke* (or *Inland Revenue*) v. *Fry* (1), a similar case in reference to a manse of the Established Church, the decision was in favour of the Crown, but it was based upon the view that the minister was entitled to let the manse. While therefore the decision was in my opinion correct, the point relied upon was irrelevant.

Lastly there is the case of *Inland Revenue Commissioners* v. *Wemyss.* (2) This was a decision that in a case somewhat similar to the present, the assessments under Schedules A and B were properly excluded in estimating the amount of income for purposes of super-tax. The right of occupation in that case was in the discretion of the trustees and was in other respects of a restricted character, and it might be enough to say that the case was decided on its own facts and is not an authority in the present case, but I feel bound to say that in my opinion the special facts there relied upon were irrelevant; the taxpayer was in actual occupation of the hereditaments, the assessment was properly made upon him as the person in the enjoyment, so to speak, of the annual value the subject of taxation, and he had not under the Act any right of recourse to another person in respect of the tax or any part thereof. I do not think the decision in the case of *Wemyss* can stand with the present judgment.

On the minor point I think the rates were paid by the trustees for the benefit and on behalf of the respondent and that the amount so paid must be treated as part of her income.

The figures are agreed.

I concur with the reasons given by the learned Lord on the Woolsack and agree to the order proposed by him.

Lord Tomlin. My Lords, it is unnecessary for me to rehearse the facts of this case which have been already sufficiently referred to by the noble and learned Lord upon the Woolsack.

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(1) 22 R. 422; 3 Tax Cas. 335.

(2) 1924 S. C. 284.

As however I have arrived at a conclusion which is not in accord with that of the majority of the judges of the First Division it is proper that I should state the reasons which have guided me, and this I think I can do briefly.

I will deal first of all with the items under Schedule A.

The respondent's argument, as I understand it, is (1.) that tax under Schedule A is charged in respect of "ownership" in lands; (2.) that the respondent's right "to occupy and possess" the mansion of Manderston and the policy parks was a personal right not in the nature of ownership, because she could not turn it into money by letting the property or parting with her interest; and (3.) that as her occupation had not inherent in it this quality of ownership she is not bound to include anything in respect of the annual value of the property under Schedule A in her return of total income for the purposes of super-tax.

In my opinion upon the true construction of the Income Tax Act this argument is not well founded.

The nature of the tax under Schedule A was explained by Lord Macnaghten in his opinion in *London County Council* v. *Attorney-General.* (1) The tax under that Schedule is a tax on "profits and gains" just as under the other Schedules. It is not a tax on ownership. The measure of the tax is annual value. The tax is cast upon the occupier, that is, upon the person having "the use" of the lands. So far as the occupier is unable under the provision of the Act to pass on the tax to some one else he has to bear it as being the tax upon the part of the annual value representing the extent of his use.

Now super-tax is an additional duty of income tax, and is levied in respect of income the total of which from all sources exceeds 2000*l.* In *Tennant* v. *Smith* (2) Lord Macnaghten pointed out that total income from all sources means more than income properly so described. It includes the annual value of property chargeable under Schedule A and the annual value of the occupation charged under Schedule B.

(1) [1901] A. C. 26, 35.

(2) [1892] A. C. 150, 161.

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My Lords, in my judgment the respondent had the use of the property in question and was the occupier thereof within the meaning of Schedule A, No. VII., r. 2. Accordingly upon the reasoning which I have indicated the annual value of the property of which she had the use was part of her total income from all sources.

This conclusion accords with the decision of the Court of Appeal in England in *Shanks* v. *Inland Revenue Commissioners* (1), and with other English decisions. It does not accord with the decision in Scotland in *Inland Revenue Commissioners* v. *Wemyss.* (2) The last mentioned case was in my opinion wrongly decided. It follows also in my view that such cases as *M'Dougal* (or *Inland Revenue*) v. *Sutherland* (3) are also wrong so far as they rest upon the supposition that a money producing quality is a necessary characteristic of an occupier's interest in order to render the annual value under Schedule A of the lands in which he has the interest part of his total income from all sources.

With regard to the items under Schedule B it is admitted that the tax is one upon occupation, but it is urged on the respondent's behalf that here again unless the capacity to turn the interest into money can be found there is no obligation to include the annual value under Schedule B in the total income from all sources. Schedule A, No. VII., rr. 1, 2, 3, 4 and 5, are made applicable to Schedule B. The respondent was therefore chargeable as occupier under this Schedule as under Schedule A. I can find nothing in the Act to support the respondent's arguments or to justify the placing upon the observations of Lord Macnaghten in *Tennant* v. *Smith* (4), to which I have already referred, a qualification which would exclude from total income the annual value under Schedule B, because of some limitation upon the occupier's powers of dealing with his interest.

Having regard to the view which I have taken of this matter it becomes unnecessary to express any opinion as to the precise nature of the interest under the trust disposition

(1) [1929] 1 K. B. 342.
(2) 1924 S. C. 284.
(3) 3 Tax Cas. 261.
(4) [1892] A. C. 150, 161.

and settlement which gives the respondent her title to occupy the property.

There remain the smaller items of charge to be considered.

The appellants at the Bar of your Lordships' House abandoned the claim in respect of the forester's wages, recognizing that there was not before your Lordships material sufficient for the determination of the question.

The rates fall primarily on the respondent as occupier, and so far as the money for this liability is provided by the trustees it is, in my opinion, money paid for her benefit, which with the income tax upon it ought to be included in her total income for super-tax purposes.

My Lords, in the result therefore I think this appeal should succeed so far as it has not been abandoned, and I concur in the motion proposed.

Interlocutor of the First Division of the Court of Session in Scotland reversed and determination of the Special Commissioners restored except so far as it dealt with the wages of the foresters. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondent to pay the costs of the action in the Inner House of the Court of Session and also the costs of the appeal to this House.

Lords' Journals, February 6, 1930.

Solicitor for the appellants: *The Solicitor for England of Board of Inland Revenue, for the Solicitor for Scotland of Board of Inland Revenue.*

Solicitors for the respondent: *Grahames & Co., for J. & F. Anderson, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1929 Nov. 25.

CHUNG CHUCK . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ATTORNEY-GENERAL FOR CANADA . INTERVENER.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Appeal to Privy Council—Power of Court of Appeal to grant Leave to appeal—Criminal Matter—Offence under Provincial Statute—Proceedings consequent upon Prosecution—Order in Council of January 23, 1911, *rr.* 1, 2 (*b*).

Upon the true construction of the Order in Council of January 23, 1911, regulating appeals from the Court of Appeal of British Columbia to His Majesty in Council, the power of that Court under r. 2 (*b*), in conjunction with the definition of "judgment" in r. 1, to grant leave so to appeal from any "decree, order, sentence, or decision" does not apply to a criminal matter.

A prosecution under a statute of British Columbia, whereby a person summarily convicted of an offence thereunder is liable to a penalty and imprisonment, and consequent proceedings by way of habeas corpus, certiorari, or case stated, raising the question whether the statute is ultra vires, are criminal matters for the above purpose.

Nadan v. *The King* [1926] A. C. 482 followed upon the second point.

Appeals dismissed upon petition as not competent.

PETITIONS to dismiss as incompetent appeals Nos. 73 and 74, since consolidated, from judgments of the Court of Appeal of British Columbia affirming (in No. 73) a judgment of the Supreme Court of the Province delivered by Murphy J., and (in No. 74) reversing two judgments of that Court delivered by W. A. Macdonald J.

The appeals, which were by leave of the Court of Appeal of British Columbia, arose out of prosecutions of the respective appellants for offences against the Produce Marketing Act (Statutes of British Columbia, 1926–27, c. 54), as amended by the Produce Marketing Act Amendment Act (Statutes of British Columbia, 1928, c. 39), and regulations and orders made thereunder. The nature of the subsequent proceedings before the Supreme Court of British Columbia and on appeal to the Court of Appeal appears from the judgment of the Judicial Committee.

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* *Present:* LORD SANKEY L.C., LORD MERRIVALE, LORD ATKIN, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

On July 3, 1929, the Attorney-General for British Columbia on behalf of the respondent lodged petitions praying that the appeals might be quashed or dismissed as incompetent having regard to s. 1024, sub-s. 4, of the Canadian Criminal Code.

On November 1, 1929, the Attorney-General for Canada was granted leave to intervene in the appeals.

The material provisions of the Order in Council of January 23, 1911 (St. R. & O., 1911, r. 170), regulating appeals to His Majesty in Council from the Court of Appeal of British Columbia, and of s. 1024, sub-s. 4, of the Canadian Criminal Code (R. S. Can., 1927, c. 36), formerly s. 1025 of the Code as enacted in R. S. Can., 1906, c. 146, appear from the judgment of the Judicial Committee.

The appeals to the Court of Appeal of British Columbia are reported at 40 B. C. R. 512.

1929. Nov. 21, 25. *H. B. Robertson K.C.* (with him *Theobald Mathew*) for the petitioner; *Macmillan K.C.* (with him *Varcoe* and *Hubert Hull*) for the intervener. These appeals are incompetent, as s. 1024, sub-s. 4, of the Canadian Criminal Code prohibits an appeal to the Privy Council from any Court in Canada in a criminal case. In *Nadan* v. *The King* (1) the Attorney-General for England admitted that the section (then s. 1025) prevented a Canadian Court from giving effective leave so to appeal in a criminal case, and the Board dismissed the appeals as incompetent, although the Supreme Court of Alberta had granted leave to appeal. The admission was right, as under s. 91, head 27, of the British North America Act, 1867, the Dominion Parliament has exclusive legislative power in Canada as to the criminal procedure. One of the cases dealt with in that appeal arose,

(1) [1926] A. C. 482, 490.

like the present cases, out of a prosecution under a Provincial statute, and it was contended that the case was therefore not a criminal case within the meaning of the section. That contention was rejected (1), *Rex* v. *Nat Bell Liquors* (2) being followed upon that point.

H. S. Wood K.C. (with him *Pincott*) for the appellants. The question whether the section prevents a Canadian Court from giving leave to appeal was left open by *Nadan* v. *The King* (3), the judgment expressly stating that the decision was confined to whether the prerogative right was affected. Under r. 2 (*b*) of the Order in Council of January 23, 1911, in conjunction with the definition in r. 1, the Court of Appeal had power to grant leave to [appeal from any "decree, order, sentence, or decision" of the Court; that included the power to give leave in these cases. The Order in Council was made pursuant to the Privy Council Act, 1844, and cannot be abridged except by an Imperial Act, or by an Order in Council or Act authorized by an Imperial Act: *Nadan* v. *The King*. (4) The appeals are not, in any sense, in criminal matters, as the question raised is one of ultra vires, and possibly a question of construction. In any case the appeals are not in criminal cases within the meaning of s. 1024, sub-s. 4. The prosecutions were under Provincial legislation passed under s. 92, head 15, of the British North America Act, 1867, and consequently did not relate to "criminal law" within the meaning of s. 91, head 27, under which head the Criminal Code was passed: *Canadian Pacific Wine Co.* v. *Tuley*. (5) The arrangement of the sections of the Canadian Criminal Code shows that it applies only to offences punishable thereunder. If the section is to be construed as applying to Provincial offences it is ultra vires to that extent. The effect of *Tuley's* case (5) was not considered in *Nadan* v. *The King*. (6) The observations in *Rex* v. *Nat Bell Liquors* (2) related to the word "criminal," as used in the Supreme Court Act, an Act not passed under s. 91, head 27, but under s. 101; moreover they

(1) [1926] A. C. 482, 489.
(2) [1922] 2 A. C. 128, 167.
(3) [1926] A. C. 482, 490.
(4) [1926] A. C. 482, 493.
(5) [1921] 2 A. C. 417, 423.
(6) [1926] A. C. 482.

are expressly confined to the context in which the word appears in the Act. [Reference was made also to *Reg.* v. *Eduljee Byramjee* (1) and *Toronto Ry. Co.* v. *The King.* (2)]

H. B. Robertson K.C. and (by leave) *Macmillan K.C.* in reply. Upon the true construction of the Order in Council it does not apply to a criminal case [the argument upon this point appears from the judgment]. The statute 12 & 13 Vict. c. 48, which applies to Vancouver Island and is unrepealed, confines the right to appeal to the Privy Council to civil cases. There are reported cases as to applications, sometimes successful, to Courts overseas to grant leave to appeal to the Privy Council in criminal matters, but the question whether the power to grant leave was not raised: e.g. (Transvaal) *Hong Kong* v. *Attorney-General* (3); (Nova Scotia) *Rex* v. *McLachlan* (4); and *Rex* v. *Scott.* (5) The present appeals are in criminal cases within s. 1024, sub-s. 4. The decision in *Canadian Pacific Wine Co.* v. *Tuley* (6), as to the validity of Provincial legislation under s. 92, head 15, does not affect the meaning of the word "criminal" in statutes applying throughout Canada, and therefore is consistent with *Rex* v. *Nat Bell Liquors* (7) and *Nadan* v. *The King.* (8) Under s. 91, head 27, of the British North America Act, 1867, the Dominion has legislative authority in respect of the criminal law "in the widest sense": *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (9)

H. S. Wood K.C. in rejoinder (by leave). Upon the true construction r. 2 (*b*) of the Order in Council the Court of Appeal had power to give leave to appeal in a criminal matter. [His argument upon this point appears fully from the judgment.] If the Board is of a contrary opinion special leave should be granted, as the cases were test cases for the purpose of deciding the legislative competence of the Provincial statute; no question of fact arises.

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(1) (1846) 5 Moo. P. C. 276.
(2) [1917] A. C. 630.
(3) [1910] T. P. 432.
(4) (1924) 56 N. S. L. R. 549.
(5) (1924) 57 N. S. L. R. 207.
(6) [1921] 2 A. C. 417.
(7) [1922] 2 A. C. 128.
(8) [1926] A. C. 482.
(9) [1903] A. C. 524.

J. C.
1929
CHUNG CHUCK v. THE KING.

The judgment of their Lordships was delivered by

LORD SANKEY L.C. These are consolidated appeals from a judgment of the Court of Appeal of British Columbia, and they arise out of the prosecutions instituted against the appellants for offences against the Produce Marketing Act (statutes of British Columbia, 1926–27, c. 54), as amended by the Produce Marketing Act Amendment Act (statutes of British Columbia, 1928, c. 39), and certain regulations and orders made thereunder.

The appeals are brought in pursuance of leave granted to the appellants by the Court of Appeal of British Columbia. Though the proceedings in the Courts below were somewhat different in form, both appeals raise the same point for decision here. The appellant in the first appeal, Chung Chuck, who resided and grew potatoes within the area in question in 1928, was charged on August 8, 1928, with unlawfully marketing potatoes on June 29, 1928, within British Columbia without the written permission of the Mainland Potato Committee, and was convicted and fined $10, and in default of payment, one month's imprisonment. The appellant applied by way of habeas corpus and writ of certiorari for his discharge from custody, alleging that the said Produce Marketing Act was ultra vires of the Legislature of the Province of British Columbia, for certain reasons which for the moment need not be set forth. On August 27, 1928, Murphy J. dismissed the appellant's application. The learned judge held that the statute in question did not infringe upon the powers of the Dominion Parliament under s. 91, heads 2 and 27, of the British North America Act nor upon s. 498 of the Criminal Code, revised statutes of Canada, 1927, c. 36; further, that if the statute did infringe upon s. 498 that section was ultra vires of the Dominion Parliament. It is unnecessary to discuss in detail the circumstances giving rise to the second appeal. The appeals—which have been consolidated—raise the same point.

The appellant, Chung Chuck, appealed to the Court of Appeal, and on January 8, 1929, the appeal was unanimously dismissed. In Wong Kit's case, the appellant's acquittal by

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the police magistrate having been upheld by the Supreme Court, the Crown was the appellant in the Court of Appeal, and that appeal was allowed. (1)

As already stated, the Court of Appeal granted leave to the appellant in both cases to appeal to His Majesty in Council. The Attorney-General for the Province of British Columbia put in in each appeal a petition in which he denied the competency of the Court of Appeal to give leave. He says in para. 12 of his petition: "That your petitioner respectfully submits that the conviction of the appellant by the said stipendiary magistrate on August 8, 1928, was a conviction in a criminal case in respect of a breach of a statute passed by the Legislature of the Province of British Columbia." Then he cites the case of *Nadan* v. *The King* (2), and says: "It was held by the Lords of the Judicial Committee of the Privy Council that such a conviction was within s. 1025 of the Canadian Criminal Code (R. S. Can., 1906, c. 146)." Sect. 1025 of the Canadian Criminal Code provided (inter alia) as follows: "No appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard." That provision now appears in s. 1024, sub-s. 4, of the present Criminal Code (R. S. Can., 1927, c. 36). The petition then submits that by reason of the matters set forth the Court of Appeal of British Columbia had no jurisdiction to make the order under which they gave leave to appeal. That particular contention is supported by the Attorney-General for the Dominion of Canada, and a preliminary objection is taken that these appeals are not competent because the

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(1) In Wong Kit's case there were two charges, and the magistrate, on the application of the Crown, stated two cases under s. 89 of the Summary Convictions Act (R. S. B. C., 1924, c. 245) for the opinion of a judge of the Supreme Court of British Columbia. The questions of law raised by the cases were: (*a*) whether the statute was intra vires; (*b*) whether the accused was rightly acquitted, the potatoes having been shipped to a point outside British Columbia. The cases were argued before W. A. Macdonald J., who answered both questions in the affirmative, and affirmed the acquittals.

(2) [1926] A. C. 482.

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Court of Appeal of British Columbia had no power to give leave to appeal.

In those circumstances it is incumbent upon the appellants to show two things, and they took two points. They say first: "This matter was not a criminal matter at all, and therefore we have a right to appeal; it being a civil matter, or at any rate, not a criminal matter," and secondly: "Even if it is a criminal matter still under the Order in Council of January 23, 1911, the Court of Appeal of British Columbia had power to give us leave to appeal and we are entitled to prosecute the appeal."

With regard to the first point—was this a criminal matter?—the relevant section of the Act in question, which is "An Act respecting the Marketing of Fruit and other Produce," is s. 20; that section provides: "Every shipper guilty of an offence against this Act shall on summary conviction, be liable if an individual, to a penalty not exceeding $1,000 or to imprisonment for a term not exceeding one year and if a corporation to a fine not exceeding $10,000, and every other person guilty of an offence against this Act shall be liable on summary conviction to a fine not exceeding $1,000."

Are an offence under s. 20 and the proceedings consequent upon the offence criminal matters? It appears to their Lordships that they are criminal matters. The section speaks about an offence punishable on summary conviction, exposing an individual who has been found guilty of an offence not only to a fine but to imprisonment, and in this respect it does not differ from the facts in *Nadan* v. *The King* (1), where Viscount Cave, then Lord Chancellor, in giving judgment in a similar matter, said (1): "It was argued on behalf of the appellant that neither of these appeals was brought in a 'criminal case' within the meaning of the above section; but, in their Lordships' opinion, this argument cannot prevail. In each of the cases the appellant was charged with an offence against the public law and a sentence of imprisonment could be, and was, imposed."

(1) [1926] A. C. 482, 489.

The law in question in that case was not a law of this particular Province, but a law of the Province of Alberta, but the reasoning is the same; and it appears to their Lordships that the first point made by counsel for the appellants—namely, that this was not a criminal matter, but was a civil matter in which they therefore had a right to appeal—fails.

The next point to be considered is whether the appellants have shown that it was competent for the Court of Appeal of British Columbia to give leave to appeal. He quite rightly points out that in the petition of the learned Attorney-General for the Province of British Columbia, supported by the learned Attorney-General for the Dominion of Canada, the section of the Canadian Criminal Code is relied upon, and *Nadan's* case (1) is cited, but the view which their Lordships take of the present circumstances renders it unnecessary for them to go into those points or into any question as to a conflict between the Dominion and the Provincial legislatures in respect of that section. As already stated it is for the appellants to satisfy the Board that it is competent for them to appeal, that is to say, that it was competent for the Court of Appeal of British Columbia to give the leave to appeal in question.

The way in which Mr. Wood, the appellants' counsel, seeks to show that, is by citing the Order in Council of January 23, 1911. That Order in Council was passed in pursuance of the Privy Council Act, 1844, which provides: "It shall be competent to Her Majesty, by any Order or Orders that may from time to time for that purpose be made, with the advice of Her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council from any"—attention is called to these words—"judgments, sentences, decrees or orders of any Court of justice within any British colony or possession abroad, although such Court shall not be a Court of Error or Court of Appeal within such colony or possession." Their Lordships pause for a moment to observe that the word "decision" is not one of the words

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used in that section. The words are "judgments, sentences, decrees or orders of any court of justice."

By an Order in Council referring to British Columbia, passed on July 12, 1887, not the present Order in Council but the one which preceded it, it is provided: "Whereas it is expedient that provisions should be made by this Order to enable parties to appeal from the decisions of the said Supreme Court of British Columbia to Her Majesty in Council, it is hereby ordered . . . . as follows: (1.) Any person or persons may appeal to Her Majesty her heirs and successors in Her or Their Privy Council from any final judgment, decree, order or sentence of the said Supreme Court of British Columbia in such manner, within such time and under and subject to such rules, regulations and limitations as are hereinafter mentioned; that is to say, in case any such judgment, decree, order or sentence"—again, their Lordships pause here for a moment to point out that the word "decision" is not used in the operative part, although it is used in the recital—"shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of 300*l.* sterling or in case such judgment, decree, order or sentence shall involve directly or indirectly, any claim, demand, or question to or respecting property or any civil right amounting to or of the value of 300*l.* sterling, the person or persons feeling aggrieved by any such judgment, decree, order or sentence may within fourteen days next after the same shall have been pronounced, made or given apply to the said Court by motion or petition for leave to appeal therefrom to Her Majesty, Her or Their successors, in Her or Their Privy Council."

That being the position of affairs on and after July 12, 1887, a subsequent Order in Council was passed—namely, that of January 23, 1911, and that is the Order in Council to be interpreted in the present case. As to that Mr. Wood's contention is as follows: He says, after the passing of the Order in Council of 1887, an Act was passed in British Columbia constituting the Court of Appeal, that is c. 10 of the statutes of British Columbia for 1907, which provides in s. 6: "The

Court of Appeal hereby constituted shall be a superior court of record. . . . . And without restricting the generality of the foregoing an appeal shall lie to the Court of Appeal . . . . (4.) from every decision of the Supreme Court, or a judge thereof, ... in any of the following matters, or in any proceeding in connection with them, or any of them . . . . : (*e*) case stated under the Summary Convictions Act." Then by s. 8 it is provided : "For all the purposes of and incidental to the hearing and determination of any matter within its jurisdiction and the amendment, execution and enforcement of any judgment or order, and for the purpose of every other authority expressedly or impliedly given to the Court of Appeal by this Act, the Court of Appeal shall have the power, authority and jurisdiction vested in the Supreme Court." The way in which Mr. Wood uses that Act is this. He says the word "decision" there evidently includes a case stated under the Summary Convictions Act, and, therefore, the meaning of the word "decision"—putting his argument generally—will include a criminal cause or matter.

Their Lordships now come to the section of the new Order in Council, that of January 23, 1911, itself. It says, subject to the provisions of these rules an appeal shall lie in certain cases which are set out in (*a*) and (*b*) of r. 2, and it is necessary to read both of those ; (*a*) is : "As of right from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of 500*l*. sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of 500*l*. sterling or upwards." It is not contended that a criminal matter is provided for in r. 2 (*a*), but that it is provided for in r. 2 (*b*), which says : "Subject to the provisions of these rules an appeal shall lie at the discretion of the Court from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court the question involved in the appeal is one which by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in council for decision." "That," says Mr. Wood, "is my charter ; the

Court of Appeal of British Columbia was entitled under r. 2 (*b*) to give me leave to appeal; they did give me leave to appeal, and, therefore, the preliminary objection ought to fail."

Their Lordships have been assisted by learned counsel on all sides, Mr. Wood, Mr. Macmillan and Mr. Robertson, by being referred to a number of cases, but in the view that they take of the cases it is hardly necessary for them to go into them at any length, and they do not propose to do so. The first case cited was *Canadian Pacific Wine Co.* v. *Tuley* (1), which decided that the British Columbia Prohibition Act, 1916, and the Summary Convictions Act, 1915, were both valid and within the competence of the legislature of British Columbia. The next case cited was *Rex* v. *Nat Bell Liquors.* (2) Their Lordships think that Mr. Macmillan was right in saying that the Board in that case decided, towards the close of the judgment delivered by Lord Sumner, that there was a part of the criminal law which was within the competence of the Provincial legislature. Finally there was the case of *Nadan* v. *The King* (3), where it was held that s. 1025 of the Criminal Code of Canada did not exclude the prerogative of the Crown to give leave to appeal.

None of those cases really touched the point which their Lordships have to decide, which is a very short one, that is to say, does r. 2 (*b*) of the Order in Council of January 23, 1911, give the authority to the Court of Appeal which Mr. Wood claims that it does give?

First of all it is necessary to look at the recital to the Order in Council to see whether any hint can be derived from that. It appears rather as if Mr. Wood would have to contend that the Order in Council of 1911 goes further than the Order in Council of 1887, but in the recital it is said: "And whereas it is expedient, with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the seas shall have a right of appeal to His Majesty in Council and to promoting uniformity in the

(1) [1921] 2 A. C. 417.

(2) [1922] 2 A. C. 128.

(3) [1926] A. C. 482.

practice and procedure in all such appeals, that the rules regarding appeals from the said Supreme Court contained in the said Order in Council should be revoked and provision should be made for appeals from the said Court of Appeal to His Majesty in Council." The Order in Council therefore appears from the recital to be one dealing with practice and procedure, and to unify the practice and procedure in the British Dominions beyond the seas; if that is right, it would be a rather strong thing to give it an interpretation under which it would in addition confer fresh rights.

But Mr. Wood's argument proceeds in this way. He says there are two words in the definition (1) of "judgment" which are in his favour. It will be recollected the words of r. 2 are: "Subject to the provisions of these rules an appeal shall lie as of right from any final judgment of the Court," and "at the discretion of the Court from any other judgment," and by r. 1 "judgment" includes decree, order, sentence or decision. Their Lordships think when Mr. Wood made his first submission with regard to the word "sentence" he rather relied upon the fact that the word "sentence" was a word which was appropriate to some procedure in criminal law, but when he replied he did not put his case quite as high as that, nor indeed could he have done so. Although the word "sentence" no doubt in the minds of some people is peculiarly appropriate to criminal cases and is chiefly heard in criminal trials, there is a great difference between a conviction and a sentence, and it would be very strange if leave to appeal was to be given only against a sentence and not against a conviction. As has been pointed out in the course of the argument, "sentence" is a well known word in common law, and their Lordships do not think the word "sentence" applied so as to give the right to give leave to appeal in a criminal case. With regard to the word "decision," it is said that is the word used in the Act which constitutes the Court of Appeal of British Columbia and there includes reference to matters under the Summary

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(1) Rule 1: "In these rules, unless the context otherwise requires: . . .; 'judgment' includes decree, order, sentence, or decision; . . . ."

Convictions Act. But it does not seem to their Lordships, having regard to the whole of the legislation, that any serious argument can be built upon that foundation. It has already been pointed out how the word "decision" is used. Sometimes it is used in the recital as it was used in the recital to the first of the two Orders in Council; it is not in the original Act of Parliament, it is not in the operative words of the first Order in Council, and, although it might be said that the word "decision," if it stood alone, might possibly embrace matters of both civil and criminal law, the word "decision" is not used alone here. One cannot take one word out of the Order in Council and say it may include criminal law; one must look at the whole of the Order in Council itself. It being perfectly clear that r. 2 (*a*) refers to civil matters, when we come to r. 2 (*b*) the words are: "Subject to the provisions of these rules an appeal shall lie at the discretion of the Court from any other judgment," and it looks as if the word "other" refers and relates back to the same sort of judgments as those which are referred to in r. 2 (*a*), that is to say, a judgment "where the matter in dispute amounts to or is of the value of 500*l.* sterling or upwards"—that is clearly not a criminal matter—"or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right." The words can be satisfied in this way. It may well be contended in normal cases there is to be no appeal and no leave to appeal where the matter in dispute is under 500*l.*, but there may be some case in the nature of a test action where, although the value of the question involved is a few shillings or a few pounds only, it may involve many thousands of pounds over the whole of the Province. Rule 2 (*b*) would involve a case like that. Finally, if one looks through the Order in Council itself one sees there a great number of provisions for the purpose of dealing with cases where leave to appeal is given which are entirely appropriate in civil matters and not only not appropriate in criminal matters but criminal matters do not appear to be provided for if they are included within the word "decision." Take, for example, r. 6 of the Order in Council. It is pointed out by Mr. Macmillan that it provides for a stay of execution which is entirely appropriate in a civil case, if leave is given to appeal, but it is not appropriate, nor indeed is there any provision made as to what is to happen to a man who has been sent to prison and special leave is given to him to appeal to His Majesty in Council.

To sum up: (1.) Although the word "decision" standing merely by itself might be sufficient to cover a decision either in a civil or in a criminal case, the word does not stand by itself but is in an Order in Council containing a number of other provisions working out the procedure; (2.) the Order in Council itself recites that it is passed for the promotion of uniformity in practice and procedure of all such appeals, and one would not expect to find it conferring new rights of appeal when it only purports to deal with practice and procedure in appeals; (3.) the way in which r. 2 is drafted, first of all in (*a*), where it merely relates to civil cases, and in (*b*), where it says that there is an appeal at the discretion of the Court from any other judgment, again points to the fact that 2 (*b*) is simply referring to the same class of case as 2 (*a*)—namely, to civil cases and not to criminal cases.

In those circumstances their Lordships have arrived at the conclusion that the appellants have not made out either of their points. They have not made out point (1.), that this is not a criminal matter. Their Lordships think it is a criminal matter. They have not made out point (2.), that the Order in Council of January 23, 1911, gave a right to the Court of Appeal to give leave to appeal in criminal matters. In the result the preliminary objection succeeds, not indeed upon the point which is in the petition of the learned Attorney-General for British Columbia, supported by the learned Attorney-General for Canada, but upon the point that Mr. Wood has not satisfied their Lordships that it is a civil matter, or that there was a right in the Court of Appeal of British Columbia to give leave to appeal in a criminal case. That being so, it is unnecessary to proceed with the hearing of the appeal, the preliminary objection being a good one which must prevail.

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At the last moment Mr. Wood detailed to their Lordships the great importance of this case; he told them, and they entirely accept his statement, that a number of matters in British Columbia depend upon the decision in this case, and he asks whether their Lordships could not now advise His Majesty to grant him special leave to appeal. In their Lordships' opinion that would be a very inconvenient course, and they do not think it would be right to accede to it. It must be remembered that their Lordships have decided that this is a criminal matter. They do not wish in any way to decide a question which has only been mentioned at the last moment and upon which they have not heard the respondent. Their Lordships however, without in any way prejudging or discountenancing any further steps which the parties may desire to take, would point out that the final words in the report of the case of *Nadan* v. *The King* (1) will make it very difficult to induce this Board to advise the granting of special leave to appeal in a criminal case.

In the result, in their Lordships' opinion, the preliminary objection succeeds, and they will accordingly humbly advise His Majesty that both appeals ought to be dismissed; but, the respondents and the intervener not asking for them, without costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Gard, Lyell & Co.*
Solicitors for intervener: *Charles Russell & Co.*

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(1) [1926] A. C. 482, 495, 496.

[PRIVY COUNCIL.]

MORRIS LEVENTHAL AND OTHERS . . APPELLANTS;

AND

DAVID JONES, LIMITED . . . . . RESPONDENTS.

J. C.*
1930
Jan. 28.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Landlord and Tenant—Construction of Lease of 1909 *—" Any future land tax "—State Act imposing local Rate—Sydney Harbour Bridge Act,* 1922 (*N. S. W., No.* 28 *of* 1922).

By a lease of premises in the City of Sydney entered into in 1909, the lessees covenanted to pay all rates and taxes whether parliamentary or municipal, except landlord's property tax and land tax; and by a memorandum under seal intended to be read with the lease the lessors agreed to pay " any future land tax or municipal tax on the unimproved capital value." By the Sydney Harbour Bridge Act, 1922, the legislature of New South Wales imposed upon the unimproved capital value of property in Sydney, and specified adjacent areas, a yearly rate to be collected by the Sydney Municipal Council, and to be applied by the State towards the construction of a bridge across Sydney Harbour:—

Held, that the impost under the Act was a land tax within the meaning of the memorandum, and that accordingly it was payable by the lessors.

Solomon v. *New South Wales Sports Club* (1915) 19 C. L. R. 698 distinguished.

Judgment of the Supreme Court of New South Wales 29 S. R. (N. S. W.) 70 affirmed.

APPEAL (No. 32 of 1929) from a judgment of the Full Court of the Supreme Court of New South Wales (October 29, 1928) setting aside the verdict of a jury (June 12, 1928) in an action for ejectment brought by the appellants in the Supreme Court.

The question arising in the present appeal was whether upon the true construction of a lease, dated November 30, 1909, of premises in George Street, Sydney, and of two memoranda, attached thereto and dated respectively November 30, 1909, and March 31, 1910, the liability to pay the rate or tax in respect of the premises under the Sydney Harbour Bridge Act, 1922 (No. 28), of New South Wales fell upon the appellants, the successors in title to the lessors, or upon the respondents, the lessees.

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* *Present:* VISCOUNT SUMNER, LORD MERRIVALE, LORD ATKIN, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

The material terms of the lease and of the memoranda, also the effect of the Act above named, appear from the judgment of the Judicial Committee.

The appellants, as owners, were rated or assessed under the Act for the half-year ending June 30, 1926, at 101*l.* 14*s.* 9*d.*, being ½*d.* in the £ upon the unimproved capital value of the premises. They paid that sum, and upon the respondents refusing to pay it to them they instituted the action. By their writ they claimed, in addition to other relief, possession by virtue of a power of re-entry in the lease upon a breach of covenant.

Thereupon the respondents, there being in New South Wales no fusion of law and equity, instituted a suit upon the equity side of the Supreme Court claiming a declaration as to the incidence of the tax under the lease and memoranda, and an injunction restraining the appellants from proceeding with their action for ejectment. Long Innes J., who tried the equity suit, found against the appellants upon a demurrer, and by his judgment delivered on July 25, 1927, and reported at 27 S. R. (N. S. W.) 350, 362 held that the lessees were liable for the tax, and accordingly dismissed the respondents' suit. An appeal by the respondents to the High Court of Australia was dismissed; the Court held that the demurrer should have been allowed, and accordingly dismissed the appeal without expressing any opinion upon the point of construction.

The present action for ejectment then proceeded, and was heard by Ferguson J. and a jury. The learned judge dismissed a motion by the respondents for a non-suit, expressing his agreement with the judgment of Long Innes J. in the equity suit, and directed the jury that the appellants were entitled to possession. The jury accordingly returned a verdict for the appellants; they also awarded the appellants 7626*l.* 13*s.* 4*d.* damages by way of mesne profits.

An appeal by the present respondents to the Full Court (Street C.J., James and Campbell JJ.) was allowed, the verdict being set aside, and judgment entered for the present respondents upon the ground that upon the true construction of the lease and memoranda the bridge tax was not payable by them. The appeal is reported at 29 S. R. (N. S. W.) 70.

1929. Dec. 2, 3. *W. A. Greene K.C.* and *Wilfrid Barton* (*Dare* with them) for the appellants. The lease and the two memoranda should be read together, and having regard to the then existing position under legislation of New South Wales as to the taxation of real property in Sydney. [Reference was made to the Land and Income Tax Assessment Act, 1895 (No. 15); Land Tax Act, 1895 (No. 16); Sydney Corporation Act, 1902 (No. 35); Sydney Corporation (Amendment) Act, 1908 (No. 27); also to the (Commonwealth) Land Tax Acts and Land Tax Assessment Act, 1910 (Nos. 21 and 22).] By the covenant in the lease the lessors were to have the rent reserved clear of every kind of deduction except, so far as is material, land tax. In New South Wales the words "land tax" meant a tax imposed generally upon land by legislation of the State: *Solomon* v. *New South Wales Sports Club* (1); *South Australian Brewing Co.* v. *Hill.* (2) The first memorandum is explained by the fact that the land tax payable by the Act of 1895 had been suspended, the Act of 1908 substituting for it a rate upon the unimproved capital value; the parties wished to make it clear that the substituted rate was to be paid by the lessors. The second memorandum was to provide that if the land tax was revived, or any tax ejusdem generis was enacted, the lessors were to be liable to pay it. The rate imposed under the Sydney Harbour Bridge Act, 1922, was not ejusdem generis with the land tax referred to in the lease. It was described as a rate, was imposed only within a limited area, and for a local purpose. It was a betterment rate; that principle had been applied in previous Acts applying to Sydney. The view of the learned Chief Justice that the second memorandum covered any impost upon the unimproved capital value might have the effect of imposing upon the lessors the very municipal rates which by the lease the lessees were liable to pay. [Reference was made also to *Palmer* v. *Earith* (1) and *Reg.* v. *Justices of Kent.* (2)]

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(1) 19 C. L. R. 698.

(2) [1919] A. C. 519.

Macmillan K.C. and *Earengey* for the respondents. The memoranda are not expressed merely as exceptions to the lessees' liability, but as agreements by the lessors. The lessors were liable for the bridge tax under the terms of the second memorandum. First, because the tax was within the words "any future land tax." It was ejusdem generis with the land tax, since it was a tax imposed by the State upon the unimproved capital value. It is not material that it was not imposed upon all the land in the State. Secondly, because being imposed through the medium of the municipality and collected by municipal machinery, for a purpose within the municipality, it was "a municipal tax" upon the unimproved capital value. Further, under the lease and the first memorandum the lessors were liable for the "landlord's property tax." There was in New South Wales no tax corresponding to the tax so described in English leases. The words were intended to make the lessors liable for all that type of obligation which ordinarily fell upon the landlord; the bridge tax falls within the category: Foà on Landlord and Tenant, 6th ed., p. 209.

W. A. Greene K.C. replied.

1930. Jan. 28. The judgment of their Lordships was delivered by

LORD MERRIVALE. This appeal from a judgment of the Supreme Court of New South Wales raises questions as to the construction of a series of documents exchanged between lessors and lessees of business premises in George Street, Sydney, with the intention of ascertaining precisely their respective liabilities for the taxes payable in respect of the premises. The dispute between the parties has given rise to conflicting judicial opinions, expressed in a suit in equity instituted by the lessees and an ejectment action brought by the lessors, in each of which the lessors obtained judgment, and in an appeal of the lessees to the Supreme Court of New

(1) (1845) 14 M. & W. 428. (2) (1860) 2 E. & E. 911.

South Wales where the lessees were successful. The lessors are appellants against the judgment of the Supreme Court.

The lease of the premises, dated November 30, 1909, but sealed by the respondents pursuant to a resolution of the board passed on March 1, 1910, demises the premises for thirty-three years from August 1, 1909. Among the lessees' covenants is the following: "And also will bear, pay and discharge all rates, taxes, charges and assessments and all outgoings whatsoever whether Parliamentary, Municipal, local or otherwise which now or hereafter shall be imposed, charged or assessed upon or in respect of the said premises hereby demised or any part thereof or the rent thereof or payable by the owner or occupier in respect thereof, landlord's property tax or land tax only excepted." The lease contains the usual proviso empowering the lessors to re-enter in cases of breach of covenant.

At the time of execution of the lease by the lessors a memorandum was signed by them and to this as well as to the lease the seal of the defendant company was affixed pursuant to the resolution of March 1, 1910. This memorandum, so far as is material here, is in the words following: "Memorandum . . . . intended to be read as if endorsed on . . . . lease of even date herewith . . . . whereby in order to make quite clear the covenants in such lease as to the incidence of the liability for payment of rates it is mutually agreed:—The Lessors will pay and satisfy the landlord's property tax or land tax or any municipal tax on the unimproved capital value of the land by any competent authority rated, imposed or levied. Provided that if the present rates now assessed by the City Municipal Council of Sydney on the annual rental value and which under the said lease are to be borne and paid by the said lessees should hereafter be assessed by the Council in any other form or by any other name whatsoever than the same now are then the same shall still be borne and paid by the said lessees."

A second memorandum was signed by the lessors on March 31, 1910, and sealed on behalf of the defendant company pursuant to a board resolution of April 20, 1910, and is also expressed as an agreement to be read as if endorsed upon the lease. It provided for a small increase of the rent reserved in the lease, and witnessed (inter alia) this agreement of the parties: "The lessors shall pay the land tax at present assessed and any future land tax or municipal tax on the unimproved capital value."

The present controversy between the parties arose upon the coming into effect of a statute of the Parliament of New South Wales, the Sydney Harbour Bridge Act, 1922, whereby Parliament imposed upon the unimproved value of land in Sydney, and in certain shires formed under the Local Government Acts in force in the State, an annual impost of one-halfpenny in the pound. The appellants had become in 1916 assignees of the reversion of the premises; they called on the respondents to pay the "bridge tax," as it was called, the respondents denied their liability under the lease and memoranda, and the litigation between the parties ensued.

Certain outstanding facts which are relevant to the matters at issue are not in dispute. There was not at the date of the lease and had not been any tax in New South Wales known as landlords' property tax. From 1895 onwards, until 1910, there was in force, by virtue of the Land and Income Tax Assessment Act, 1895, and the Land Tax Acts of 1895 and subsequent years, an annual impost upon owners of land—called in the statutes "land tax"—and on January 28, 1910, this tax, pursuant to statutory powers vested in the Governor by a statute of 1908, had been as regarded the city of Sydney, "suspended." The Land Tax Assessment Act, 1895, nevertheless, remained unrepealed. In November, 1910, by a Commonwealth statute, "land tax"—under this name—to be levied and paid upon the unimproved value of lands, came into being as a fiscal measure of the Commonwealth.

The relevant section of the Land and Income Tax Assessment Act of 1895, to which reference has been made, provided for assessment by Commissioners appointed by the Crown and the annual levy for the use of the Crown, at such rate as Parliament should from time to time enact per pound sterling of the assessed value of lands situate in New South

Wales, of a "land tax" to be paid "by every owner of land in respect of all land of which he is such owner for every pound of the unimproved value," subject to an immaterial deduction.

The process of "suspension" of the land tax of 1895 in New South Wales is succinctly described in the case for the appellants to this effect: "In 1906 and 1908 the Parliament of New South Wales adopted the policy of abandoning the State land tax in favour of a rate upon the unimproved capital value of land to be imposed by the local government for local government purposes. This was effected as to Sydney by the Sydney Corporation (Amendment) Act, 1908, which provided for the levying (starting with the year 1909) in addition to the municipal rates provided by the Act of 1902 of a rate upon unimproved capital value. Such rate was to be paid by the owner and nothing in the Act was to affect an agreement between landlord and tenant. Immediately upon the imposition of the said new rate the operation of the Land Tax Act was to be suspended. By the same Act further duties and liabilities were imposed upon and certain cash payments exacted from the Sydney Municipal Council."

The City Council accepted under the Sydney Corporation (Amendment) Act, 1908 (s. 11, sub-s. 1) the duty in and for the year 1909 and every succeeding year to make and levy "a general rate of not less than one penny in the £ upon the unimproved capital value of all rateable property in the City . . . . in addition to the rates otherwise leviable" in the City. The statute imposes this rate, also limits the maximum amount leviable in respect thereof. Later sections of the same Act vest in the Council designated lands held theretofore by trustees for public purposes and impose upon the Corporation liabilities for certain specified annual payments to the Treasury. It is noteworthy that in respect of one of the delimited areas of land power is reserved to the executive of the State to resume possession without compensation of any necessary part thereof as "a site for piers for a bridge across Sydney Harbour."

The Sydney Harbour Bridge Act of 1922, enacted by the Parliament of New South Wales to provide for the erection of a high level bridge across Sydney harbour, places the cost of the bridge upon the exchequer of the State as to two-thirds of the amount, and as to one-third provides for payment out of the proceeds of " a rate leviable yearly of one halfpenny in the pound upon the unimproved value," inter alia, of " all lands within the City of Sydney and rateable under the Sydney Corporation Act, 1902," or amending statutes. The Bridge Act provides that the rate thereunder shall not be included in calculating the maximum " amount that may be levied as rates under the Local Government Acts or the Sydney Corporation Acts." By s. 10 of the Act the Sydney Council are required to collect the " rate " and pay the proceeds to a special account in the Treasury " to be applied by the Colonial Treasurer for the purposes of the Act."

The appellants, in their case, and by the arguments advanced at the hearing, have contended (*a*) that the yearly charge imposed by the Bridge Act is in its nature " neither a land tax nor ejusdem generis with land tax " ; (*b*) that—applying the language of the second memorandum—it does not come within the words " land tax at present assessed and any future land tax or municipal tax on the unimproved capital value " ; and (*c*) " that the words ' land tax ' have acquired a settled meaning in New South Wales and mean a tax imposed by the State Land Acts upon all lands within the State or tax substituted therefore." The judgment of the Supreme Court, it was contended, would expose the lessors of the premises to peril of being held liable for local burdens unlimited in kind or amount regardless of the lessees' general acceptance of the obligations in respect of the same under the terms of the lease. Upon the latter topic reference was made to the fact, as stated in the appellants' case, that " in the year 1916 the basis of assessment for municipal rates in Sydney was by statute so changed that ordinary municipal rates became payable on the basis of unimproved capital value."

There is not in the case which the respondents have made upon the appeal any ground for apprehension that by some judicial process taken at their instance or otherwise, the lessees' obligations in respect of the local rates of the demised premises—emphasized by the second memorandum—may be abrogated. Nor is a contested suit on a narrow question of law an occasion for forecasting legislative measures of taxation or statutory changes in the incidence of local burdens. The one question presented for determination in the Courts of New South Wales and now raised for decision at this Board is whether under the lease and memoranda in question the lessees are guilty of breach of covenant when they refuse to pay the "bridge tax."

There is no inherent impossibility in the contention made on the appellants' behalf that the words "land tax" had in New South Wales in 1909 and 1910 a settled meaning ascertained in effect by reference to the state of things which came about under the Land and Income Tax Acts, 1895, and the Land Tax Acts of subsequent years. Further, if the remarkable series of facts in the fiscal development of the State which have been already summarized had never come into being, it might be persuasively argued that the agreements of the parties in 1910 provided for nothing more than the incidence of the New South Wales land tax of 1895 and the proposed substitutional "general rate" in Sydney on unimproved values. How definitely the designation of a long-established tax may become fixed as a term of art in law or a term of assured meaning in everyday speech is illustrated by common knowledge in England that although the land tax imposed as a tax in 1688 and reimposed annually as a tax during the succeeding century was by statute in 1798 converted from an annual parliamentary impost to a permanent rentcharge saleable and redeemable this fixed burden on British landed property so far as it remains unredeemed continues to be described as "land tax" in statutes, legal instruments, and current speech.

What is to be done in this case is to ascertain two things: First, did the parties, according to the fair construction of the terms they used, agree upon payment by the lessors of the specified tax and the specified general rate which have been identified, and no more, or did they agree that, subject to the provision in the lease and the first memorandum for payment of the City rates by the lessees, any land tax or municipal tax upon unimproved capital value should be borne by the lessors ? Secondly, and if the latter view is correct, does the "bridge tax" fall within the ambit of the lessors' liability so defined ?

Some evidence of fact is always admissible to assist in judicial determination of the true meaning of the language of parties to an agreement, though the parties may not testify as to their intention. Land tax in England could be defined by well known facts in the law, including various statutes. Land tax in New South Wales would no doubt be definable in a like mode in a wide range of cases. Here also there are facts in the law and matters apparent in the successive acts of the parties which cannot be excluded from consideration. While the fiscal changes of 1908–10 were being worked out the parties made three attempts to define the lessors' liabilities. The bare words in the lease : "All rates, taxes . . . . and all outgoings whatever, whether parliamentary, municipal, local or otherwise . . . . now or hereafter . . . . imposed . . . . landlords, property tax or land tax only excepted" would probably have been construed to impose on the lessees the "general rate" and the "bridge tax." The first memorandum is plainly enough designed to fix on the lessors the burden of the general rate under the Act of 1908 which was then in course of being substituted for the land tax of 1895. By March 31, 1910, land tax in the older significance of the terms was gone, and the substitutional general rate had taken effect, and lay upon the lessors. Nevertheless, the parties made a further agreement ; an agreement as to "any future land tax or municipal tax upon the unimproved capital value."

The second memorandum appears on the face of it to be purposely framed in general terms with a natural regard to the recent materially relevant facts, and it places upon the lessors not only the liability for "the land tax at present assessed"—the land tax suspended under the proclamation of January 28, 1910, but for any future land tax and any future municipal tax upon the unimproved capital value. This purposed enlargement of the scope of the lessors' liabilities appears to their Lordships to negative the first of the two main propositions of the appellants—namely, that the parties agreed only as to a tax in the standardized form of the Acts of 1895 and any municipal charge established in substitution for it. The words "any future land tax" remove the old limitations.

What then is a land tax? A yearly impost laid upon real property by parliamentary enactment for the provision of public revenue appears to be within the description. The appellants advanced in support of their case the judgment of the High Court of Australia in *Solomon* v. *New South Wales Sports Club* (1), where the High Court was required to construe a covenant in a lease of property in Sydney made in 1909 whereby lessees had covenanted to pay taxes, rates, etc., both municipal and government which were or thereafter should be assessed or imposed "except land tax," and this exception was held not to extend to the general rate in substitution for land tax under the Sydney Corporation (Amendment) Act, 1908. Two concise phrases from the judgment of Griffith C.J. were cited; where his Lordship says: "I am unable to see any reason for thinking that the term 'land tax' has ever been used in New South Wales . . . . in any other sense than a tax on land directly imposed by the State," and again: "It seems to me that what the parties desired to express was that the covenant should extend to all taxes except taxes on land directly imposed by a legislature having power to impose them." Had the lease in the present case stood alone the judgment in *Solomon* v. *New South Wales Sports Club* (1) would have made any dispute between the parties improbable if not impossible. As matters are the definition of "a land tax" which is given by the learned Chief Justice may well be applied here. The bridge tax is "a tax on land directly imposed by the legislature of the State."

The appellants' contention, that though directly imposed by the legislature, the bridge tax is not a land tax, was

(1) 19 C. L. R. 698.

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supported by argument founded in particular on two manifest facts. The bridge tax does not extend to land generally throughout New South Wales but to a limited area comprising the City of Sydney and certain specified shires, and the purpose of the tax is not that of providing the public revenue for the common purposes of the State but of providing funds for a particular scheme of betterment. No authority was vouched for the proposition that an impost laid by statute upon property within a defined area, or upon specified classes of property, or upon specified classes of persons, is not within the true significance of the term a tax. Nor so far as appears has it ever been successfully contended that revenue raised by statutory imposts for specific purposes is not taxation. No stress was laid in the argument before their Lordships on the fact that the Act of 1922 requires the City Council of Sydney to collect and pay over to the State the amount authorized to be charged. This fact in no way affects the nature of the burden. The last mentioned contention of the appellants fails.

Their Lordships will humbly advise His Majesty that the judgment of the Supreme Court should be affirmed. The appeal will be dismissed with costs to be paid by the appellants.

Solicitors for appellants: *Bartlett & Gluckstein.*
Solicitors for respondents: *White & Leonard.*

[PRIVY COUNCIL.]

BOUZOUROU . . . . APPELLANT ;

AND

THE OTTOMAN BANK . . . . . . RESPONDENTS.

J. C.*
1930
Jan. 21.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Master and Servant—Wrongful Dismissal—Disobedience of Servant—Legality of Order—Personal Risk—Employment by Bank—Transfer to distant Branch.

An order by a master to his servant to remain in a place within the area of his employment is a lawful order unless it involves immediately threatening danger by violence or disease to the person of the servant.

Observations in *Turner* v. *Mason* (1845) 14 M. & W. 112 approved.

The appellant, a Christian Turkish subject in the employment of the respondent bank, was ordered by them to be transferred from their Stamboul branch to their branch at Mersina, a distant place in Turkish Asia Minor. He refused to go on the grounds: (1.) That Mersina was not within the area of his employment; (2.) that the order was unreasonable in the view of his ignorance of Turkish, and the hostile attitude of the Turkish civil authorities to him. He was thereupon dismissed without notice, and brought an action for wrongful dismissal:—

Held (1.), on the facts—distinguishing *Anderson* v. *Moon* (1837) 15 Shaw, 412—that Mersina was within the area of the appellant's employment, and (2.), approving *Turner* v. *Mason* 14 M. & W. 112, that as he did not suggest that compliance with the order would involve him in personal danger, the order was lawful and his disobedience to it a faute grave which under the contract justified his dismissal.

Judgment of the Supreme Court of Cyprus affirmed.

APPEAL (No. 6 of 1929) from a judgment of the Supreme Court of Cyprus (July 30, 1928) reversing a judgment of the District Judge of Nicosia.

The appeal arose out of an action for wrongful dismissal brought by the appellant against the respondent bank in the circumstances stated in the judgment of the Judicial Committee.

The trial judge gave judgment for the plaintiff for damages.

On appeal the Supreme Court (Belcher C.J. and Fuad J.; Sertsios dissenting) set aside the judgment and dismissed the action.

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* *Present:* LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, and LORD THANKERTON.

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BOUZOUROU
v.
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OTTOMAN
BANK.

1929. Nov. 12, 14, 15. *Harold Murphy* and *C. S. S. Burt* for the appellant.

Macmillan K.C., Hon. Geoffrey Lawrence K.C., Ronald Smith and *I. W. G. Barry* for the respondents.

1930. Jan. 21. The judgment of their Lordships was delivered by

LORD THANKERTON. In the present case the appellant, who appeals by special leave in forma pauperis, sues the respondent bank for damages for wrongful dismissal and for a declaration that he was entitled to be paid a monthly pension of 39*l.* 4*s.* by the respondents. He appeals from a decision of the Supreme Court of Cyprus dated March 27, 1928, reversing the decision of the trial judge.

The appellant, who is a Christian Ottoman subject, entered the service of the bank in April, 1905, and remained in its service until March 7, 1927, when he was dismissed without notice and without pension, because of his refusal to conform to an order by the respondents in January, 1927, for his transfer from the branch at Stamboul, where he was then employed, to the branch at Mersina, a town in the Asiatic provinces of Turkey on the south-east coast of Asia Minor.

The appellant maintains (1.) that under the terms of his contract of service the sphere of his employment did not include the provinces of Turkey, but only the head office and branches in Constantinople and its suburbs, which include Stamboul, and (2.) *esto* that the provinces of Turkey were included, the particular order was unreasonable in view of his ignorance of Turkish and the hostile attitude of the Turkish civil authorities, and was one which he was not bound to obey.

On January 25, 1905, an advertisement appeared in the newspaper Stamboul in Constantinople, which stated: "The Imperial Ottoman Bank offers under competitive examination five posts in its offices in Constantinople or in the provinces"; among the subjects of examination set out in the advertisement was included, "Languages spoken or written by the candidates and especially Turkish." The appellant, who was then in other employment in Constantinople, but did not know Turkish, applied, and was among the successful candidates. In a minute of meeting of the respondents' management committee on April 6, 1905, it is recorded: "Staff: After inspection of the examination papers of the last competitive examination held, the general management have decided to engage the following: Ap. Michaelides, Joachim Levy, Josue Sinai, Jean Ouannou, Alex. Bouzourou, on the permanent staff at a salary of Ltq. 8 per month." On April 17, 1905, the following decision is found in the respondents' books: "By decision of the Director-General dated April 6, 1905, Mr. Alex. Bouzourou is engaged in the bank's service (head office) as from April 17, 1905, with salary Ltq. 8 per month." On April 20 the appellant subscribed the printed form of declaration of adherence to the regulations governing the "pensions and superannuation fund," the provisions of which are therein stated to form an integral part of "my engagement in the Imperial Ottoman Bank." While the terms of these regulations throw no direct light on the contractual sphere of the appellant's employment, it is to be noted that every employee of the bank, on entering its service, is required to subscribe to them, the whole staff—whether employed in Constantinople or the provinces or abroad—being treated as a unit for the purposes of the pension and superannuation fund. These are the only contemporaneous documents which are relevant to the consideration of the terms of the appellant's engagement, and they are all produced and founded on by the appellant in his evidence.

The appellant, who was the only witness on this point, states: "I saw a notice calling for candidates for employment in the defendant bank. There was a competitive examination. I said I knew no Turkish. I was successful in that examination. I was appointed at the head office in Constantinople at a salary of £T.8 a month, in the defendants' department of general correspondence. At the time of entering service of defendant bank, Mr. Maltass asked me 'Will you have a post with 8*l.* in Constantinople or 12*l.* in the provinces ?' I accepted the post for Constantinople."

In the Courts below the respondents maintained that the contractual sphere of employment of the appellant was unlimited, and that they would have been entitled to transfer him to one of their foreign branches, but in the appeal they maintained mainly that the ambit of employment was Constantinople and the provinces, though they still retained their former view as an alternative.

In their Lordships' opinion the history of the various appointments of the appellant during his twenty-two years' service does not afford any definite explicatory evidence as to the terms of the original contract. In their Lordships' opinion the evidence shows that transfer is one of the ordinary incidents of the bank's employment, being usually concurrent with an increase of salary and responsibility, and suggests no more than that the bank considered their officials' convenience where possible. It is significant that, throughout the correspondence protesting against his dismissal, the appellant did not suggest that the transfer to Mersina was a breach of his contract, and that it was not suggested in his evidence until the cross-examination, when he stated: "When I joined the bank I did not know that I was liable to be sent into the provinces," and, again, "employees are not bound to serve the bank outside the place where the contract was made except with their consent."

The appellant sought to found on a new form of declaration imposed by the respondents on new employees engaged after August, 1926, and a revised form of declaration imposed on those engaged after February, 1927, devised to put beyond doubt the bank's right to transfer its employees to any branch. In their Lordships' opinion these can have no bearing on the terms of the appellant's engagement in 1905.

It is not unimportant to consider the nature of the service which the appellant entered. The appellant was a young man of twenty-three; as provided in art. 1 of the regulations he was engaged without limit to the duration of his engagement, and it is admitted that the bank was entitled to decide from time to time what particular department of the bank's service he was to serve in and to move him, for instance, from the correspondence department to the accountancy department. He may be assumed to have hoped for promotion and thereby to rise high in the service. From the point of view of proper organization of their staff, it is difficult to assume that the bank would willingly agree that their employees should not be bound to serve outside the place where the contract was made except with their consent, and, in their Lordships' opinion, such a condition of the contract would require to be clearly established. The nature of the service in this case is different from that of the yearly engagement as a spinner of the defender in the Scottish case of *Anderson* v. *Moon* (1), where it was held that the contract was applicable to one mill only.

Their Lordships are of opinion that the reference to five vacant posts in the advertisement and the choice of posts given to the appellant by Mr. Maltass related merely to the initial step in an unlimited employment in the service of the bank, which followed on engagement on the permanent staff of the bank, and that the appellant has failed to establish that the appointment to an initial post at Constantinople involved that no subsequent appointment to another post could be made except to another post in Constantinople. While their Lordships incline to the view that the terms of the advertisement might be held to limit the service to Constantinople or the provinces, it is unnecessary to come to a definite conclusion on that point.

The appellant further maintains that, even if Mersina was within the contractual ambit of his employment, he was not bound to obey the order of transfer to that place on the ground that the order was so unreasonable as to be unlawful, and his disobedience could not be held by the respondents to constitute faute grave within the meaning of art. 5 of the regulations.

The only case referred to on this point was *Turner* v. *Mason* (2), where a domestic servant sued in respect of alleged wrongful dismissal. The plaintiff had requested her master's leave to absent herself for the night, her mother having fallen ill and being in peril of her life; it was not clearly alleged that the plaintiff had communicated this reason to her master. The latter refused leave, and the plaintiff nevertheless absented herself, whereupon she was dismissed. It was held that a plea of demurrer was good, as showing a dismissal for disobedience to a lawful order of the master, and that the replication was bad, as showing no sufficient excuse for such disobedience. Pollock C.B. said: "It is very questionable whether any service to be rendered to any other person than the master would suffice; she might go, but it would be at the peril of being told that she could not return." Parke B. said: "Even if the replication showed that he had notice of the cause of her request to absent herself, I do not think it would be sufficient to justify her in disobedience to his order; there is not any imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her." Alderson B. said: "There may undoubtedly be cases justifying a wilful disobedience of such an order, as where the servant apprehends danger to her life, or violence to her person, from the master, or where, from an infectious disorder raging in the house, she must go out for the preservation of her life." Rolfe B. said: "In truth the cases suggested by my brother Alderson are cases in which there is not legally any disobedience, because they are cases not of lawful orders. It is an unlawful order to direct a servant to continue where she is in danger of violence to her person, or of infectious disease."

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(1) 15 Shaw, 412.

(2) 14 M. & W. 112.

Their Lordships agree with the view that there must be an immediately threatening danger by violence or disease to the person of the servant before an order to remain in the zone of danger can be held to be unlawful.

None of the reasons put forward by the appellant in excuse of his refusal to go to Mersina comes within the above category; the two main reasons given by the appellant were his ignorance of Turkish and the unfavourable attitude of the Turkish authorities; he did not suggest that the latter involved any personal danger to him. The only other reason, which was not stated prior to the dismissal, was that he would have been obliged to leave his family in Constantinople. Accordingly their Lordships are of opinion that, in ordering the appellant to go to Mersina, the respondents were giving a lawful order, which the appellant was bound to obey, that his disobedience was justifiably treated by the respondents as "faute grave" under art. 5 of the regulations, and that his dismissal was justified.

For these reasons their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Wordsworth, Marr, Johnson & Shaw.*

Solicitors for respondents: *Bischoff, Coxe, Bischoff & Thompson.*

[PRIVY COUNCIL.]

THE OTTOMAN BANK . . . . APPELLANTS;

AND

CHAKARIAN . . . . RESPONDENT.

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1930
Jan. 21.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Master and Servant—Wrongful Dismissal—Order subjecting to personal Danger—Temporary Disability to perform full Service—Right to maintain Action—Damages—Rate of Exchange.

The respondent, an Armenian and a Turkish subject, was in the permanent employment of the appellant bank. In 1922, while employed at their Smyrna branch, he was sent on business of the bank to the head office at Constantinople, and was given temporary employment there. He informed the appellants that his life was in danger in Constantinople from the Turkish authorities, and asked to be transferred to a branch outside Turkey. That being refused he fled from Constantinople. He was dismissed without notice, and brought an action for wrongful dismissal:—

Held, that as the evidence established that the respondent's personal safety was in real danger in Constantinople, his flight was not a "faute grave" entitling the appellants under the contract to dismiss him; and that as his disability to perform his contract, whether in Constantinople or elsewhere, could not at the date of his dismissal be regarded as permanent, his offer to serve outside Turkey entitled him to maintain the action.

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* *Present:* Lord Blanesburgh, Lord Warrington of Clyffe, and Lord Thankerton.

Held, further, that conversion into sterling of the damages in Turkish currency in respect of the respondent's pension under the contract should be at the rate of exchange at the date of his dismissal, not at the date of the judgment.

Observations in *Turner* v. *Mason* (1845) 14 M. & W. 112 approved and applied.

Judgment of the Supreme Court of Cyprus varied.

Consolidated Appeal and Cross-appeal (No. 129 of 1928) from a judgment of the Supreme Court of Cyprus (March 25, 1928) varying a judgment of the District Court of Nicosia.

The appeal arose out of an action for wrongful dismissal brought by the respondent against the appellant bank, in circumstances which appear from the judgment of the Judicial Committee.

The trial judge gave judgment for the plaintiff for damages.

Upon appeal the Supreme Court (Belcher C.J. and Sertsios J.; Fuad J. dissenting) affirmed the judgment as to liability, but remitted the case in order that the damages might be reassessed upon a basis which the Court indicated. In the result the damages were reduced from 2000*l.* to 1110*l.* The defendant bank appealed, and the plaintiff cross-appealed as to the amount of damages.

1929. Nov. 7, 8, 11, 12. *Macmillan K.C.*, *Hon. Geoffrey Lawrence K.C.*, *Ronald Smith* and *I. W. G. Barry* for the defendants.

Latter K.C. and *Hon. S. O. Henn Collins* for the plaintiff.

1930. Jan, 21. The judgment of their Lordships was delivered by

Lord Thankerton. In this action the plaintiff, who is respondent in the leading appeal, seeks to recover damages for wrongful dismissal from the defendant bank, who are appellants in the leading appeal.

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1930

The Ottoman Bank v. Chakarian.

The trial judge found the appellants liable in damages, which he assessed on an alternative basis. The appellants appealed to the Supreme Court of Cyprus, who affirmed the trial judge on the question of liability, but directed the reassessment of damages on a lower basis. From that judgment the leading appeal was taken by the appellants on the question of liability, and the respondent has taken a cross-appeal on the question of damages.

The respondent, who was an Armenian and a Turkish subject, became a temporary employee of the appellant bank in 1901 at the branch office at Aidin in Turkish Asia Minor. In 1903 he entered the permanent service of the bank, and subscribed to a book of regulations, called "Caisse de Pensions et de Retraites," which deals with conditions of service and a contributory pension fund for the staff. He continued in their service until January 27, 1923, when he was dismissed without notice and without pension under the circumstances referred to later.

The respondent remained at the Aidin branch until 1913, when he went to the Sokia branch, from which he was retransferred to Aidin in June, 1919, immediately before the destruction of Aidin by the Kemalists, by whom he was imprisoned and sentenced to death. The timely arrival of the Greek forces enabled him to avoid the execution of the sentence and to escape to Smyrna. After various changes he came back to Smyrna in July, 1920, and he remained there until September 8, 1922, when he applied for and obtained leave, but was asked by Mr. Simmons, the branch manager, to take a confidential letter to the head office at Constantinople.

The respondent arrived at Constantinople on September 10, 1922, delivered the letter, and was given temporary employment at the head office, which appears to have superseded his leave. Meantime Smyrna was destroyed by the Turkish forces. The respondent's story of his experiences at Constantinople, which substantially remains unchallenged, is as follows: "I found Constantinople in a disturbed state. I went to the bank and saw Mr. Ungar, the sub-manager

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in the Direction Generale. I gave the confidential letter Mr. Simmons had given me to Mr. Ungar. I also told him what Mr. Simmons had told me confidentially. I explained to him the state of affairs in Smyrna. At this interview I asked him to allow me to leave Constantinople, because it was unsafe for me to remain. I told him I had been condemned to death at Aidin and that therefore I could not remain. Mr. Ungar referred me to Mr. Skanzianni, le chef du personnel. I saw him. At the office of Mr. Skanzianni, Mr. Bouzourou happened to be present, and Mr. Skanzianni called in the chef du bureau, Mr. Goyar. I explained everything to Mr. Skanzianni and asked permission to leave. He laughed at me. Mr. Bouzourou was then chef du bureau du personnel. I was not given leave. I stayed in Constantinople for 20 days, asking him every day to transfer me to any branch outside Turkey. They would not do so. Instead of giving me leave they gave me temporary work. On Thursday evening, on coming out of the office, I came across Tewfik Bey who had been chief of police at Aidin at that crucial time. He was in mufti. I could not recognise him. He questioned me. I was much perturbed and immediately changed my hotel for fear that he should betray me at any time. On the Friday (September 28) the bank was closed. On the Saturday I went to relate the incident of meeting Tewfik Bey to my chief. The chiefs came late, 9.30 or 10 A.M., so I saw two sub-chiefs, Mr. Berturucchi and Mr. Baache. I related to both of them the incident of meeting Tewfik Bey, explained to them the whole affair; and stated that as my life was in danger I wanted to leave at once. There was a ship leaving on the Saturday morning at 10.30 A.M. for Athens. I had told these two gentlemen that I was going to Athens; and I left by this boat."

The respondent reached Athens on October 1, 1922, and found there Mr. Simmons and most of the Smyrna staff. On October 3 Mr. Simmons advanced to the respondent his salary for October, but took it back from him in view of a telegram he had received from the head office to the effect that the respondent was dismissed, though the ground of dismissal was not then stated.

In a letter of October 2, addressed to Mr. Simmons, and letters of October 18 and November 15 addressed to the head office, the respondent recounted the circumstances of personal danger which moved him to leave Constantinople, and again requested transfer to a branch outside Turkey. To the head office he protested against the dismissal. On November 29 the appellants wrote to the respondent: "We can hardly take into consideration the reasons put forward by you to explain your precipitate departure and your dereliction of the service. We would besides remind you that you have behaved in an analogous manner in 1920 when you were at Adana, and your relapse fully justifies the measure of revocation (dismissal) that has been applied in your case. However, we are willing to attenuate that penalty and would ask you to tender your resignation—which would enable us, on receipt of your letter, to consider the possibility of granting you pecuniary assistance. It should nevertheless be understood that this is a mere offer resulting out of extreme benevolence on our part, and that, should the same not be accepted by you, and should your acceptance of same not be notified to us within 25 days from to-day, it should be regarded as null and void." The respondent declined that offer, and ultimately his name was struck off the list of members of the bank's staff on January 27, 1923.

Provision is made for dismissal in art. 5 of the "Caisse de Pensions et de Retraites" as follows: "La direction générale a le droit de révoquer les employés pour faute grave ou abus commis dans leur fonctions, ou pour violation du secret qu'ils doivent garder sur les affaires de la banque. La direction générale est seule juge d'apprécier le caractère de gravité de la faute. Elle a le droit de révocation pour fautes légères successives et répétées malgré l'avertissement des supérieurs."

Under art. 18 neither an indemnity nor a pension of any other nature is granted to an employee who has been dismissed. Under art. 19 an employee who resigns has no right to any pension or indemnity, but the direction générale have the faculty to grant him an amount not exceeding in capital the amount of the sums retained from his salary. Under art. 2 a discharged employee has right to three months' notice and an indemnity borne by the pension and superannuation fund and to be fixed in terms of art. 21.

It was not disputed by counsel for the appellants that the risk of personal danger which caused the respondent's flight from Constantinople, in disregard of the appellants' repeated refusals to allow him to leave, was real and justified from the point of view of his personal safety, and, in their Lordships' opinion, this is established by the evidence, and, in particular, by that of Roy McLaughlan, an officer in the intelligence department attached to the High Commissioner's office in Constantinople. He stated that an Armenian who had been condemned by the Turkish authorities to death would be in "an uncomfortable position" there at the end of September, 1922, and that if he had been in the respondent's shoes he would have left Constantinople at the first possible opportunity.

On the contrary, the appellants submitted three contentions, all of which were based on the view that the respondent incurred a permanent personal disability, which incapacitated him from further ability to perform adequately his part of the contract. These contentions were (1.) that, as a condition precedent to recovery of damages, the respondent must be in a position to offer implement of the contract on his part, and that the respondent, by reason of his permanent personal disability, was not in such a position; (2.) that the supervening incapacity of an employee to perform the services contracted for, was a valid ground for dismissal, even though not founded on at the time of dismissal as a justification; and (3.) that by reason of the respondent's permanent personal disability the contract became incapable of further performance, and that accordingly both parties were released from its obligations, thus excluding any action based on breach of contract. This contention was based on the principles to which effect was given in *Horlock* v. *Beal* (1) and cases therein referred to.

It was not seriously maintained by the appellants that their order to the respondent to remain in Constantinople was a lawful order which the respondent was bound to obey at the grave risk of his person. In their Lordships' opinion, the risk to the respondent was such that he was not bound to obey the order, which was therefore not a lawful one: *Turner* v. *Mason* (1) per Alderson B. and per Rolfe B.

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(1) [1916] 1 A. C. 486.

It follows that the respondent's refusal was not "faute grave" such as is necessary to justify dismissal under art. 5 of the regulations.

Admittedly the respondent undertook by his contract to serve the bank in Turkey or any of its branches elsewhere, and the contentions of the appellants must all be tested as at the time of dismissal. In their Lordships' opinion, the appellants have failed to establish that at the time of dismissal they were entitled to regard the respondent's disability as a permanent one. In his letter of October 2 the respondent requested a provisional transfer to one of the agencies outside Turkey "whilst awaiting the end of the present situation." The appellants have not suggested any impossibility of compliance with that request; indeed, they probably never considered it, in the view that they took of the situation.

On the views expressed above that the order to remain in Constantinople was not a lawful order, and that at the time the disability could not be regarded as a permanent one, their Lordships are of opinion that the respondent's offer of service outside Turkey is sufficient to entitle him to pursue the present suit, and that the appellants are equally unable to found on that disability as justification for the dismissal.

The failure of the appellants to establish that the disability had become permanent and that they could not employ him meantime at some place where the disability did not affect him also disposes of the contention that the contract has become impossible of performance by the time of dismissal.

Accordingly their Lordships are of opinion that the dismissal of the respondent by the appellants was wrongful and that the respondent is entitled to recover damages.

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(1) 14 M. & W. 112, 117, 118.

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On the question of damages, their Lordships agree with the majority of the learned judges of the Supreme Court both as to the measure of the damages and the basis on which —for that purpose—the pension to which the respondent would have been entitled is to be calculated. Their Lordships are of opinion that the pension must be calculated, in terms of art. 14, on the basis of the salary which the respondent in fact received on December 31, 1922, irrespective of how that salary was arrived at. On that basis parties are agreed that the respondent would have been entitled to a pension of £T.56.375, but their Lordships are of opinion that the rate of conversion for the purposes of a decree in sterling should be the rate current at the time of dismissal instead of that current at the date of the decree; parties are agreed that the former rate should be taken as 720 piastres to the £. In the view that their Lordships take of the measure of damages, parties are agreed that the amount of damages should be arrived at by taking the appropriate proportion of the 2000*l.* awarded by the trial judge on this basis, the amount of damages will be 1378*l.* 10*s.* 6*d.*, and the judgment of the Supreme Court will fall to be modified to that extent and the cross-appeal to be allowed for that purpose.

Their Lordships will therefore humbly advise His Majesty that the leading appeal should be dismissed with costs and that the cross-appeal should be allowed without any order as to costs.

Solicitors for appellants: *Bischoff, Coxe, Bischoff & Thompson.*
Solicitors for respondent: *Hedley Norris & Co.*

[PRIVY COUNCIL.]

J. C.*
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Jan. 23.

LORD STRICKLAND (IN PLACE OF ALFREDO PARNIS) AND OTHERS . . . APPELLANTS;

AND

GIUSEPPE GRIMA (IN PLACE OF WALTER AGIUS, DECEASED) AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF MALTA.

Prerogative of Crown—Appeal to Privy Council—Construction of Letters Patent—Tribunal for determining disputed Elections—Malta Constitution Letters Patent, 1921, *art.* 33.

The Malta Constitution Letters Patent, 1921, provide by art. 33 "all questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by Our Court of Appeal in Malta."

The Court of Appeal having held that the election of the second and third appellants to the Senate was null and void, and special leave to appeal to His Majesty in Council having been granted:—

Held, that the intention of the above article of the letters patent was to designate the Court of Appeal a special tribunal finally to determine all questions of the nature stated without annexing to the jurisdiction the ordinary incident of an appeal to the Crown under the prerogative to admit an appeal; and accordingly that the appeal should be dismissed.

Théberge v. *Laudry* (1876) 2 App. Cas. 102 followed.

APPEAL (No. 64 of 1929) by special leave from a judgment of the Court of Appeal of Malta, dated August 14, 1928.

By the said judgment the election of the appellants, E. A. Mifsud and M. A. Borg, as the two special members representing the Malta Trade Union Council in the Senate of Malta, under art. 5 of the Constitution of Malta Letters Patent, 1921 (S. R. & O., 1921, p. 1464), was declared to be null and void as having taken place on a panel of electors which was not the proper panel at the date of the election writ.

The proceedings were instituted by writ of summons dated July 5, 1928, in the Court of Appeal of Malta under art. 33

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* *Present:* LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, and LORD THANKERTON.

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of the letters patent, which provides that "all questions which may arise as to the right of any person to be or to remain a member of the Senate or the Legislative Assembly shall be referred to and decided by the Court of Appeal in Malta."

The first plaintiff was Walter Agius, in his capacity as President of the Trade Union Council; on his death the present first respondent Giuseppe Grima was substituted for him in that capacity. The first defendant was Dr. Alfredo Parnis, in his capacity as Minister for Justice; the present first appellant Lord Strickland was substituted for him in that capacity.

The judgment appealed from was the unanimous judgment of Mercieca C.J., Buhagiar and Sultana JJ., and followed a previous decision of the Court delivered on December 5, 1927. The Court of Appeal rejected an application for leave to appeal to His Majesty in Council. Special leave so to appeal was granted by the Judicial Committee on November 5, 1928.

1929. Nov. 4, 5, 7. (1) *Macmillan K.C.* and *A. B. Keith* (with them *David Davies*) for the appellants.

Sir Thomas Inskip K.C. (with him *Colombos*) for the respondents. This appeal is not competent. Art. 33 of the letters patent conferred on the Court of Appeal a special jurisdiction, which was entirely outside its ordinary jurisdiction as a distributor of justice; its decisions under the jurisdiction so conferred were intended to be final, and without the incident of an appeal to the Privy Council under the prerogative being annexed: *Théberge* v. *Laudry* (2). The principle of that decision was explained in *Cushing* v. *Dupuy* (3), and it was followed in *Moses* v. *Parker.* (4) The distinctions drawn in *In re Wi Maiua's Will* (5) do not apply to this case.

Macmillan K.C. in reply. The question of the competence of the appeal should have been raised by motion to quash

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(1) The appeal was fully argued upon the merits; only the arguments as to its competence are reported.

(2) 2 App. Cas. 102.

(3) (1880) 5 App. Cas. 409.

(4) [1896] A. C. 245.

(5) [1908] A. C. 448.

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the appeal, not at the hearing. The appeal is competent. An appeal under the prerogative lies to the King, as the fountain of justice throughout the Empire, from every Court throughout his dominions and possessions, and the right so to appeal can be taken away only by an imperial statute: *Nadan* v. *The King.* (1) The Court of Appeal in dealing with disputed elections acted as a Court: *City of Montreal* v. *Brown* (2); *The Windsor Case* (3); *The Taunton Case.* (4) The article does not use the word "finally" before "decided." An article similarly worded appears in other similar Orders in Council, but where it is intended that the decision shall be final that is expressed in a later article, which does not appear in these letters patent, e.g., Trinidad and Tobago (Legislative Council) Order in Council, 1924, arts. 21, 29. *Thêberge* v. *Laudry* (5) is distinguishable. In that case the power to decide election disputes had been vested in the Legislative Assembly, that power was merely transferred to the Supreme Court by a local Act. Here the letters patent gave a jurisdiction not previously existing to determine judicially a certain class of cases. The respondents having invoked the jurisdiction, are bound by all its incidents, including that of an appeal under the prerogative.

1930. Jan. 23. The judgment of their Lordships was delivered by

LORD BLANESBURGH. This appeal is concerned with the validity of the election in July, 1928, of two of the appellants, Messrs. Mifsud and Borg, to be members of the Senate of Malta, representatives there of the Trade Union Council of the Island. The Court of Appeal in Malta, by a judgment of August 14, 1928, has declared their election to be null and void and this is an appeal from that judgment.

A preliminary question of serious importance at once arises—namely, whether His Majesty can be advised further to entertain the appeal, and their Lordships, in the first instance at all events, must direct their minds to the consideration of that question to the exclusion of every other.

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(1) [1926] A. C. 482, 491–493.

(2) (1876) 2 App. Cas. 168, 183.

(3) (1869) 1 O'M. & H. 1, 7.

(4) (1874) 2 O'M. & H. 66, 74.

(5) 2 App. Cas. 102.

Although special leave to appeal had been granted by His Majesty in Council, it was recognized that it was not thereby intended that the Board, with all the facts before it, should be precluded from reconsidering whether the appeal was competent, and counsel on both sides before their Lordships agreed that that problem could only be satisfactorily solved after the Board had become seised of the history and nature of the controversy out of which it emerged. The arguments accordingly proceeded on that footing to their conclusion. Their Lordships will follow the same course, and before specifically dealing with this preliminary issue, will, without canvassing in detail the legal and constitutional questions discussed before them, give some account of the circumstances which have led up to the present situation.

Responsible self-government for Malta in internal affairs was in 1921 granted by His Majesty through the Malta Constitution Letters Patent, 1921. The Maltese legislature thereby brought into existence consists of two houses—the Senate and the Legislative Assembly. The Senate is a house of seventeen—seven general members and ten special members. Of these special members, two, nominated by the Archbishop of Malta, represent the clergy ; two, the nobility ; two, the graduates ; two, the Chamber of Commerce, and two—and it is with these that this case is concerned—the Trade Union Council, a body so described in the letters patent. The method of electing the representatives of the nobility, the graduates, the Chamber of Commerce and the Trade Union Council, the registration of voters in and for any such classes and the conduct of such elections, are all matters under art. 5 (3.) of the letters patent, to be governed by such rules as may from time to time be determined by the nobility, the graduates, the Chamber of Commerce and the Trade Union Council respectively. It is apparently left to each of these orders to resolve how it shall be constituted for electoral purposes and particularly whether every member, say, of the

Trade Union Council, must himself be a member of a constituent Trade Union. Art. 6 (1.), however, in effect provides that no person may be elected as a special member of the Senate who is not himself qualified to vote at the election.

It was apparently assumed that at the date of the letters patent there was in Malta a Trade Union Council as definite in its constitution as the Chamber of Commerce. But in fact no such Council existed, and it became necessary in order to overcome the difficulty thus ensuing for the Governor to utilize the power conferred upon him by art. 67 of the letters patent by which he is enabled to make to the letters patent within one year from their commencement, such additions as might be necessary in order to carry out their purposes.

Accordingly His Excellency with the previous consent of the Secretary of State by proclamation dated September 15, 1921, declared that the term " Trade Union Council " wherever used in arts. 5–7 inclusive, of the letters patent, should mean a council or other body recognized by the Governor as representing the Trade Union Council of Malta for the purposes of the letters patent.

In pursuance of the powers so vested in him a Trade Union Council was recognized by the Governor on September 16, 1921, and that Council elected two representatives to the Senate. In 1924 these representatives resigned their seats, which, on September 30, 1926, were still vacant.

On that day a government notice was issued, No. 308 of 1926, making regulations for the purpose of constituting a Trade Union Council of Malta. These regulations provided for the appointment of a registrar who was to compile a register of trade unions and each trade union so registered was to elect representatives to the Trade Union Council— one representative for every hundred of its members. The Governor was empowered to recognize the persons elected by the registered trade unions as the Malta Trade Union Council for the purposes of the letters patent and the persons thus recognized were to elect a president and a returning officer. By art. 14 it was provided that the Governor, on being apprised of the election of these officials, should immediately issue a writ to the returning officer commanding him to hold an election of two members to represent the Trade Union Council in the Senate. The Council recognized under these regulations was by art. 16 to remain in existence until December 31, 1928, and subsequent elections were to be held in the December of 1928, and of each subsequent year. The government notice of September 16, 1921, was thereby cancelled.

These regulations were, it appears, impugned by the president, the secretary and the returning officer of the Trade Union Council as recognized in 1921, and an action was instituted by them to obtain a declaration of their invalidity. But it was brought before any election had taken place under the regulations, and for that reason it was held to be premature and it failed.

No further obstacle being put in the way of the regulations they were acted upon, and by government notice 93 of March 11, 1927, which is the basis of the case laid before their Lordships by the respondents, and now by the appellants as well, the body of persons in the schedule termed the "Trade Union Council," whose names are there set out were recognized by His Excellency the officer administering the government as representing the Trade Unions of Malta for the purposes of the letters patent. The Trade Union Council so recognized consisted of twenty-four members representing eight unions. Of them, nine members represented the Unione Cattolica San Giuseppe, the appellant, Mr. Mifsud, being one of these, and amongst the seven other unions represented were the Imperial Government Workers' Benefit Society and the Società dei Piloti.

Thereafter on May 11, 1927, rules made by the Council so recognized for conducting the election of its two special members for the Senate were published in the government "Gazette," an election was held, and by a government notice of June 17, 1927, Mr. Walter Agius and the appellant Mr. Michel Angelo Borg were declared to have been duly elected members of the Senate.

Three days later, however, on June 20, 1927, the Senate and Legislative Assembly were dissolved by proclamation and between June 25 and August 2, writs to the electing bodies to the Senate other than the Trade Union Council were issued. In reference to this Council, all the representatives thereon of the Unione Cattolica San Giuseppe (which will now be referred to as the Unione), except the appellant, Mr. Mifsud, had on May 22, 1927, resigned from the Council; a note to their resignations signed by Mr. Mifsud stating that as he conscientiously felt that his conduct in the Council was absolutely correct, he found it impossible to resign unless he was asked to do so by those who sent him as their delegate in a general meeting legally convened. At a general meeting held on June 27, 1927—but which Mr. Mifsud says was both irregularly convened and held—the members present by resolution purported to expel him from the Unione and struck his name off the Unione's representatives on the Council. On July 1, 1927, Mr. Mifsud wrote to the Governor setting forth his position in the matter and on July 8, 1927, he brought an action in the First Hall of the Civil Court against the President of the Unione impugning his expulsion. That action has never been brought to a hearing and is still pending.

Following upon the resolution of June 27, 1927, the Unione treated their entire representation on the Trade Union Council as vacant and on July 29, 30, and 31, 1927, they held a ballot for the election of their nine representatives. On August 1, 1927, the result of the ballot was intimated to the Minister of Justice, and by him as head of the ministry to the Governor: and by government notice No. 303 of August 9, 1927, the nine persons so elected were recognized by His Excellency for the purposes of the letters patent, as the representatives on the Trade Union Council of the "Unione" in substitution for the delegates whose names had appeared in government notice No. 93 of March 11, 1927.

The appellant, Mr. Mifsud, was not one of those elected. He did not stand as a candidate—not perhaps unnaturally—although it would appear that under the regulations of

September 30, 1926, his expulsion from the Unione, even if valid, would not technically have been a bar to his election. Their Lordships, however, have been more struck by another feature of this election. It is said that members of both political parties stood as candidates, and their Lordships have found nowhere in the voluminous record any suggestion that the election was, as an election, in any way irregular or that the gentlemen elected did not accurately and adequately reflect in their own opinions, the then views of the members of the Unione.

On the same day, but, as the Court of Appeal must be taken to have found, after that recognition by the Governor of the new representatives of the Unione had been published, the writ for the election of its two special members in the new Senate was issued to the returning officer of the Trade Union Council. The date originally fixed for the election was August 16, 1927. At the request of the Council this date was subsequently extended to August 25, 1927. On August 14, 1927, however, as the results of the general election proceeding in the other constituencies were showing that in the new Legislative Assembly, the then ministry would be in a minority, Sir Ugo Mifsud, its head, tendered his resignation to the Governor. This was accepted, and on the same day the appellant, Lord Strickland, was entrusted by the Governor with the duty of forming a new administration, a task which was completed on August 16, 1927.

Thereafter, on the same day, on the advice of his new ministers, the Governor in Council, by government notice No. 323, revoked the regulations of September 30, 1926, and annulled all that had been done by virtue of the same. Four days later, by government notice No. 335, His Excellency recognized a new Trade Union Council, excluding therefrom representatives of the Unione, the Imperial Government Workers' Benefit Society and the Società dei Piloti—and adding delegates of the National Farmers' Union, the National Union of Seamen and the Union of Dockyard Employees. The election writ of August 9, 1927, was withdrawn, and on September 2, 1927, a new writ was issued for the election by the Trade Union Council, as now recognized, of its two representatives on the Senate. In the result, by notice 370 of September 19, 1927, it was announced that Colonel Savona and the appellant, Mr. Borg, had been returned without opposition as these representatives.

This election was at once impugned by the respondents other than Mr. Grima and in an action for the purpose was by judgment of the Court of Appeal dated December 5, 1927, declared null and void. The Court of Appeal, in giving its reasons therefor, expressed the view that the issue of the writ by the Governor and the fixing of the dates for the different stages of the election procedure must be held to constitute the commencement of the election : that once a Trade Union Council had been recognized by the Governor for the purposes of a given election, he could not recognize another Council if that election had commenced but had not been concluded, and that the only body competent to elect its two representatives for the two seats rendered vacant by the dissolution of Parliament was the Trade Union Council recognized by the Governor under the government notices Nos. 93 and 303 of 1927.

Leave to appeal to His Majesty in Council having been refused by the Court of Appeal, and on May 17, 1928, by His Majesty in Council, that judgment is now final and binding.

The appellant, Lord Strickland, as head of the ministry, and his colleagues thereupon came to the conclusion, and, as they suggest, rightly, that their proper course, as that most in accordance with the principle in the Court of Appeal's judgment, was to cause the election of the two senators representing the Trade Union Council to be held by that Council as recognized at the time of the dissolution of Parliament on June 20, 1927, i.e., by the persons whose names were scheduled to government notice No. 93 of March 11, 1927, and by them only. Accordingly, government notices Nos. 163 and 168, of June 19 and 21, 1928, were issued to the delegates whose names were so scheduled, directing them to choose a returning officer to whom a fresh writ might be issued for the election of the representatives of the Trade Union Council in the Senate; and ultimately a writ for the election of these two representatives was, on June 25, 1928, issued to the returning officer who had been so chosen. The election took place, and resulted as published on July 6, 1928, in the appellants, Mr. Mifsud and Mr. Borg, being declared to have been returned uncontested. This is the election now impugned, and it is convenient to note before going further that at the first of the two elections advised by the new Government, both the appellant, Mr. Mifsud, as its representative, and the Unione were disfranchised altogether; while at the second Mr. Mifsud, although not amongst those chosen on August 9, 1927, was the sole effective representative of the Unione, the other eight representatives named in notice No. 93 having disappeared, as above appears, by resignation.

The challenge of this second election was immediate. It was made in this action brought in the Court of Appeal on July 5, 1928, by the respondents, Mr. Agius and Mr. Grima, on behalf of the Trade Union Council as a whole, and Dr. Mizzi as president and delegate of the Società dei Piloti, and by a unanimous judgment of that Court, delivered on August 14, 1928, it was held, as it had been held on the occasion of the previous election, that the only body competent to elect members for the two seats in the Senate, now in question, was the Trade Union Council recognized by the Governor by government notices Nos. 93 and 303 of 1927: and that the election of the appellants, Messrs. Mifsud and Borg, by the constituency named only in government notice No. 93 was null and void. As to the claim of the appellant, Mr. Mifsud, that under art. 16 of the regulations of September 30, 1926, he was entitled to remain a member of the Trade Union Council up to December 31, 1928, the Court of Appeal held that he had thereunder no vested right to remain an elector or an eligible candidate, as these regulations were merely a ministerial measure and, as such, subordinate to the absolute right of the Governor to recognize from time to time the persons who should form the Trade Union Council for the purposes of the letters patent. These persons, for the election in question, and as representatives of the Unione, were those named in government notice No. 303 of 1927.

Special leave to appeal from this judgment, as has been already stated, was granted by His Majesty in Council on November 5, 1928.

Now their Lordships in the above recital have refrained from referring to the many topics, both of law and of constitutional practice, which were discussed before them by learned counsel on both sides. They have referred only to those matters which seem in some sense relevant to the preliminary question to the consideration of which they now proceed—namely, whether His Majesty can be advised by them further to entertain this appeal.

The clause of the letters patent which deals with this matter is art. 33, and is in the following terms: "All questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by Our Court of Appeal in Malta."

To their Lordships, these words appear to be clear and distinct. They direct that all questions touching the membership either of the Senate or Legislative Assembly created by the letters patent themselves shall "be referred to and decided" not by the First Hall of the Civil Court, or any Court of first instance, but by the Court of Appeal of Malta, the highest judicial tribunal of the Island. Even if their Lordships had in this matter been without authority to guide them, they would have been led by the words themselves to the clear conclusion that His Majesty had advisedly designated his Court of Appeal in Malta finally to determine all these questions. It appears to their Lordships that the section being found in letters patent, in which His Majesty's own words are used, gains in this respect an added significance, the force of which ought to have full effect given to it.

But this view is, their Lordships find, fully confirmed by the authorities, of which *Théberge* v. *Laudry* (1) is the most notable.

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(1) 2 App. Cas. 102.

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In that case, which dealt, as this does, with questions relating to the membership of legislative bodies, it is pointed out that decisions upon such matters are not decisions of mere ordinary civil rights: that such an enactment as this art. 33 creates an entirely novel jurisdiction, the history of which, in cases where the legislative assembly is not itself then created for the first time, has been that the assembly has, by its own consent, concurred in vesting in the Court the jurisdiction hitherto inherent in itself of determining the status of those who claim to be its members. The jurisdiction is extremely special: it is of a character that ought, as soon as possible, to become conclusive, in order that the constitution of the assembly may be distinctly and speedily known. There is another reason for finality in such a jurisdiction. It concerns what, according to British ideas, are normally the rights and privileges of the Assembly itself, always jealously maintained and guarded in complete independence of the Crown so far as they properly exist, and, as Lord Cairns adds in delivering the judgment of the Board in *Théberge* v. *Laudry* (1): "it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place . . . . their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown."

It is true that these words were spoken in a case where the special tribunal had been created with the consent of the Legislative Assembly, and not as, in this instance, where the Assembly is itself brought into existence by the letters patent, which also confer this jurisdiction on the Court of Appeal. But, as it appears to their Lordships, His Majesty, in these letters patent is merely adopting principles, to which all Lord Cairns's reasoning applies. He assumes that any enlightened legislative body would itself choose just such a tribunal as he himself prescribes for the determination of all such questions: accordingly, he creates a jurisdiction in terms of finality which leave no room for any review by himself.

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(1) 2 App. Cas. 108.

And the history of this case, as their Lordships have detailed it, serves to demonstrate the convenience of the course in this instance taken. The action impugning the election here was commenced on July 5, 1928: the decision of the Court of Appeal was given in little more than a month—on August 14, 1928. It is more than a year later that this appeal comes before the Board.

Their Lordships would also permit themselves this further observation. While not intimating any opinion on the merits or otherwise of the appeal—although these were fully argued before them—they cannot refrain from expressing their satisfaction that the Court of Appeal was able to uphold, in principle, an election at which the Unione would have been fully represented by delegates whose views, it seems, would have adequately reflected the then opinions of their constituents, the members of the Unione. The position of the Unione in either of the two impugned elections was very different, as their Lordships have pointed out. It cannot be too clearly understood that the first duty of the Governor in recognizing any Trade Union Council is to see that it represents, so far as is possible, the views of the ultimate constituents who are represented by its members. The views, as such, of any political party in the state—whether those of the government or of the opposition, or of any other group, should not be allowed to enter into the question of recognition at all.

Upon the whole matter, and for the reasons given, their Lordships will humbly advise His Majesty that this appeal

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be not further entertained. The appellants must pay to the respondents the costs they have incurred in resisting it.

Solicitors for appellants: *Witham, Roskell, Munster & Weld.*

Solicitor for respondents: *H. S. L. Polak.*

[HOUSE OF LORDS.]

H. L. (E.)*
1930
Feb. 13.

JONESCO . . . . APPELLANT;

AND

BEARD . . . . RESPONDENT.

Practice—Judgment obtained by Fraud—Setting aside—Mode of Procedure—Action—New Trial—Evidence—Jurisdiction.

It is the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action, in which the particulars of the fraud must be exactly given and the allegation must be established by strict proof.

Although there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial, if for any special reason departure from the established practice is permitted, the necessity for stating the particulars of the fraud and the burden of proof are in no way abated and all the strict rules of evidence apply.

APPEAL from an order of the Court of Appeal setting aside a judgment of Maugham J. in favour of the appellant in an action brought by the respondent against the appellant, and ordering a new trial of the action, on the ground that the judgment had been obtained by fraud.

The appellant employed the respondent as trainer of his race-horses during the racing season of 1927 at a remuneration of 2*l*. 10*s*. a week, in addition to providing him with board and lodging.

In December, 1927, the respondent issued the writ in this action in the Chancery Division and claimed relief against the appellant under two heads.

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He alleged (1.) that by an agreement made between the respondent and the appellant in February, 1927, the appellant, as additional remuneration for the respondent's services as trainer, agreed to give to the respondent a one-fourth share of each of eight horses, which he named, and (2.) that the respondent sold and delivered to the appellant two race-horses named Zette and Why Worry for 240*l.*, and that that sum was still owing to him.

Maugham J. disbelieved the respondent's story in all essential details, and on the evidence and documents before him decided both issues against the respondent, and he gave judgment for the appellant with costs.

The respondent appealed, and asked that the judgment should be set aside and a new trial had between the parties.

On the hearing of the appeal the respondent, by leave of the Court, produced further evidence, consisting of a number of affidavits addressed to the second head of claim, and containing allegations of fraud against the appellant. The effect of this evidence is stated in the opinion of Lord Buckmaster.

Lord Hanworth M.R. (in whose judgment Lawrence and Russell L.JJ. concurred) came to the conclusion upon the further evidence that the respondent had made out a prima facie case that the documents used at the trial by the appellant were not what they purported to be and that the trial was tainted with fraud, and accordingly the Court ordered that the judgment should be set aside and that the action should be retried before one of the judges linked with Maugham J.

1929. Dec. 3, 5. *Croom-Johnson K.C.* and *Harold Simmons* for the appellant.

Singleton K.C. and *A. E. Woodgate* for the respondent.

The House took time for consideration.

1930. Feb. 13. LORD BUCKMASTER. My Lords, the appellant in this appeal was the defendant in an action brought against him by the respondent claiming (*a*) a share in eight named race-horses either as a joint owner with the plaintiff to the extent of one quarter or as a partner; (*b*) a sum of 240*l.*, the price of two horses known as Why Worry and Zette, alleged to have been sold and delivered by him to the appellant in October, 1927.

The questions at issue were purely questions of fact, and the learned judge who tried the action having expressed his disbelief in the respondent's story, dismissed the action with costs. Judgment to that effect dated July 12, 1928, was duly drawn up, passed and entered.

On August 23, 1928, the respondent served a notice of appeal asking (*a*) for a new trial, but without specifying any grounds or alternatively (*b*) that judgment be entered for him in the action. The Court of Appeal have ordered a new trial, and from their judgment this appeal has been brought.

On the hearing before the Court of Appeal affidavit evidence was filed in support of the appeal and answered. It is on these affidavits that the new trial was ordered. In part they consisted of statements as to evidence not forthcoming at the trial and in part of allegations of fraud. The former did not form the foundation of the judgment of the Court of Appeal, and indeed they could not have done so, for there was no sufficient explanation of why the evidence had not been available at the trial and why no application for adjournment had been made. These statements do not merit examination and may be disregarded. It is the charge of fraud that is the sole reason supporting the judgment now under appeal. Viewed simply as a matter of procedure the course taken was irregular. It has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires. In *Flower* v. *Lloyd* (1) the Court of Appeal, consisting of Jessel M.R., James and Baggallay L.JJ., held there was not jurisdiction in the Court of Appeal to entertain a similar application, with regard to one of their own judgments. James L.J. states that "you cannot go to your adversary and say, 'You obtained the judgment by fraud and I will have a rehearing, of the whole case' until that fraud is established." *Flower* v. *Lloyd* (1), *Cole* v. *Langford* (2) and *Baker* v. *Wadsworth* (3) show that the right procedure for that purpose is by action. That, however, there is jurisdiction in special cases to set aside a judgment for fraud on a motion for a new trial may be accepted. *Hip Foong Hong* v. *H. Neotia & Co.* (4) is such a case; but it should be remembered that this case had come up to the Privy Council on this procedure and the Board would naturally be unwilling to defeat a case at its last stage on such a ground.

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(1) (1877) 6 Ch. D. 297, 302.

If, however, for any special reason departure from the established practice is permitted, the necessity for stating the particulars of the fraud and the burden of proof are no whit abated and all the strict rules of evidence apply. The affidavits used must, therefore, be examined as on final trial; every particle of hearsay evidence and reference to documents, not produced, must be excluded, and it must be kept constantly in mind that the rules which permit, on interlocutory proceedings, hearsay evidence, where the exact source of the information is afforded, have no more application than they would possess were the deponent a witness in the box speaking at the trial.

I cannot help thinking that it is because these considerations were not properly placed before and impressed upon the Court of Appeal that they have pronounced a judgment which, in spite of the skill of counsel for the respondent, I can find no ground to support.

To explain the reasons for my opinion some examination of the facts is necessary. The fraud charged related to the claim for the price of the two horses alleged to have been sold to the appellant. Were such fraud properly established I agree with the Court of Appeal in holding that the whole judgment would thereby have been vitiated. Fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the Court, it spreads to and infects the whole body of the judgment. Assuming then that the difficulty of procedure is overcome, was such fraud specified and proved here ?

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(1) (1879) 10 Ch. D. 327, 333.
(2) [1898] 2 Q. B. 36.
(3) (1898) 67 L. J. (Q. B.) 301.
(4) [1918] A. C. 888.

The transaction of the sale of the two horses took place in Brussels in September, 1927. The two horses were bought on successive days. The first, named Zette, was bought at a selling race on September 5, and the second, Why Worry from a Mr. Verheyleweghen on September 6. The respondent's case was that both these horses were bought by him out of a sum of 240*l.*, which he gave to the appellant in English notes, receiving in exchange from him the necessary purchase price in francs.

It is the truth of that story that was investigated by Maugham J. and it need not be again examined.

In connection with the transaction, however, four important documents wese produced at the trial referred to by the Master of the Rolls as 9, 10, 11 and 12.

No. 9 is a document incorrectly printed under date February 5, 1927; it obviously should be September 5, 1927. It purports to be a provisional receipt given from the Central Office (presumably of the Belgian Jockey Club) for 16,190 francs received from the appellant for the filly Zette. It is signed L. Monnaye.

No. 10 purports to be the official receipt for the sale of the filly Zette for 16,240 francs received from the appellant. It is dated September 5, 1927, given at the Central Office of the Jockey Club and signed for them A. Haublatz. The difference in amount between the two sums is probably due to fees.

No. 11 is an invoice for 60 francs purporting to be given to the appellant by one Guillaume de Clerck dated September 6, 1927, for moneys due for veterinary services to the two horses.

No. 12 is a receipt for transport of the horses in these words :—

"Reçu de Monsieur Jonesco la somme de mille francs pour voyage Stockel-Anvers Why Worry, Zette.

"Bruxelles, le 6 Sept., 1927.

"Pour quit
"Aylin
"6 Sept. 1927.

"AYLIN."

Taking these documents in order there is no evidence impugning 9 and 10. Neither Monnaye nor Haublatz give any evidence at all. There is nothing whatever to suggest that these gentlemen are not what they purport to be and nothing to show the receipts are not in proper order. The respondent's statement as to these documents taken from his affidavit sworn on December 5, 1928, is as follows: "On the 17th July, 1928, after the trial of this action I proceeded to Belgium for the purpose of discovering the explanation how the documents produced by the defendant were issued to him. I proceeded to the Belgian Jockey Club at Brussels and saw the secretary. On the 22nd day of July, 1928, I met by appointment the secretary of the Belgian Jockey Club at the Office Central (who had purported to issue the receipts to the defendant) for the purpose of inspecting the register recording the name of the purchaser of the horse 'Zette' sold to me by public auction. It took some fifteen minutes for this book to be discovered and in the presence of the secretary of the Belgian Jockey Club (Leynen) Mr. De Vreer the chief reporter of the 'Sport Elevage' and myself the clerk who made out document No. 10 in the bundle of correspondence produced the entry in the registry for our inspection. The entries in such register recorded the sale of the horse 'Zette' to me and the defendant's name did not appear anywhere."

As evidence on the hearing of an action, the whole of this is inadmissible, but, were it otherwise, it is remarkable that while the respondent purports to interview the secretary and the clerk who made out the document, by neither of them even by this hearsay evidence are the documents themselves repudiated or their accuracy impugned.

As to document 11, Mr. G. de Clerck says he was asked by a Mr. Heath (an important witness for the appellant) in the spring of 1928 for a duplicate in the name of Jonesco of the receipt he had already given to the plaintiff. He says the plaintiff was the only person he knew in the matter and the only person by whom he was paid. Two things are remarkable on this statement—first, that the document is not a receipt at all, and, secondly, the deponent nowhere says it is not a true duplicate, but that it has no value and was given "to confirm the payment by the plaintiff"—an astonishing method of confirmation if it was given in the wrong name and was not a receipt but an invoice.

This leaves only document 12, and this is the one on which the whole judgment depends, for it is the fraud believed to have been connected with this that has tainted the whole proceedings.

The evidence about it is to be found in all that is left of an affidavit by Montague Victor Aylin and his wife filed on October 15, 1928. It is as follows: "Some time during the spring of this year the said William Heath called upon me and my wife at Stockel. He stated he wanted a receipt for the One thousand francs paid me by Jonesco. I asked why he wanted the receipt as it was five months or more after the payment and he stated the reason to be that Beard was trying to get the money from Jonesco twice over."

The original affidavit, from the wreck of which this paragraph remains, contained a large number of other statements, all of which have been absolutely contradicted by the same deponents in a later affidavit. As witnesses I should regard these people as worthless, but supposing the paragraph quoted stands, and it is not answered, it proves no more than that a duplicate receipt was required stating in exact and specific terms what is the undoubted truth. That the appellant paid the money is proved by the plaintiff himself. In examination in chief, he says in explanation of how the appellant accounted for the balance of 240*l*. said to have been placed in his hands over and above the price of the horses, "There was the transport of the horses from Brussels to Antwerp that he paid, 1000 francs," and again, also in chief, he said that, the man in charge of the van for transporting the horses not knowing the cost of the transport, "I told him that if Mr. Aylin, who was his master, sent the bill to Mr. Jonesco at the Palace Hotel he would pay the bill, and it was done." Again, in cross-examination he says in answer to the question that his evidence in chief had rendered wholly unnecessary, "Did he (i.e., the appellant) pay for the transportation ? " "He paid the bill." "Which bill ? " "the bill for 1000 francs," and when the receipt, now said to have been fraudulent, is shown him he says, "That is perfectly right." After that evidence had been given the receipt which had become a useless document is put in, and so far as I can see never referred to again.

Nor was there need for such reference, since it does no more than furnish evidence of what appears to be the only clear and undisputed fact in the case. It is not surprising therefore that the learned judge who tried the case did not even refer to it in his judgment, and when the Master of the Rolls says of the learned judge in reference to his statement that the appellant "paid the cost of the removal of the two horses to England" he was referring to this document as being one of the contemporary documents which could be examined to see how far they recorded the transactions carried out at the time, and again, "He was then looking at the receipt of 6th September as one of the documents made in the ordinary course of duty as between the parties and, therefore, prima facie entitled to afford evidence of what passed at the time," he is assuming what might have been the case had the payment been challenged, and is overlooking the complete uselessness of the document having regard to the plaintiff's own evidence.

To explain how the matter strikes me let me assume A. owes B. money and pays him. He either takes a receipt or he does not. If he does, and loses it, is it a fraud for A. to ask B. to give him a duplicate ? If, on the other hand, he does not take a receipt at the time and asks for one later on, is that a fraud? I ask myself who is or who can ever be deceived by the production of a receipt under such circumstances ?

I cannot help thinking in this case that has happened against which no vigilance can guard. Owing to some slip or omission in the conduct of the argument the actual facts were never before the Court. It is clear their attention was not called to the irregularity of the procedure, and I feel certain also that it was not directed to the facts I have

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set out. The judgment cannot stand. The judgment of Maugham J. must be restored and the respondent must pay the costs here and in the Court of Appeal.

VISCOUNT DUNEDIN. My Lords, I concur.

LORD WARRINGTON OF CLYFFE. My Lords, I concur.

LORD BUCKMASTER. My Lords, my noble and learned friends Lord Blanesburgh and Lord Tomlin request me to say that they agree with the judgment that I have read.

Order of the Court of Appeal reversed and judgment of Maugham J. restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the Chancery Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Feb. 13, 1930.

Solicitors for the appellant: *Wingfields, Halse & Trustram.*
Solicitor for the respondent: *F. W. Perkins.*

[HOUSE OF LORDS.]

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BIRMINGHAM CORPORATION . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue — Income Tax — Local Authority — Housing Scheme — Interest on Housing Loans—Exchequer Subsidy towards Deficit—Liability to account for Tax deducted from Interest on Loans—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21. *Housing, Town Planning, &c., Act,* 1919 (9 *&* 10 *Geo.* 5. *c.* 35), *s.* 7—*Local Authorities* (*Assisted Housing Schemes*) *Regulations,* 1919, *Art. IV.*

In 1920 the appellant Corporation undertook an Assisted Housing Scheme under the Housing, Town Planning, &c., Act, 1919, and for the purpose of the scheme borrowed money on local bonds secured on their rates, revenue and property. In each of the years ending April 5, 1922, 1923, and 1924, the separate account kept in respect of the scheme, as required by regulations under the Act of 1919, showed a loss due entirely to the need to pay interest on the local bonds. This loss was largely made good by an Exchequer subsidy, as provided by these regulations. The Corporation had one fund only, the borough fund, any deficiency on which was met by raising a borough rate. Into this fund the balance of profits of the Corporation's commercial activities was paid. During each of the three years the total taxed profits of the Corporation's property paid into the fund exceeded the aggregate amount of interest on loans payable by the Corporation, including the interest on loans under the Housing Scheme. In paying the interest on the local bonds the Corporation deducted income tax, but in the Housing Scheme account the gross amount of interest was charged as an element of loss. The question for determination was whether the appellant Corporation was liable to account to the Crown for the tax so deducted under r. 21 of the All Schedules Rules of the Income Tax Act, 1918. The Crown contended that the Exchequer subsidy must be regarded as having been applied for the purpose, so that to that extent the interest was paid out of money not already brought into charge, but the Corporation contended that the interest must be treated as paid out of profits and gains forming part of the borough fund which had already been brought into charge, and that the Exchequer subsidy only went to recoup the borough fund:—

Held, that in so far as the taxed income of the Housing Scheme was insufficient to meet the interest on the loans, the interest was not payable, or was not in fact paid, out of profits and gains brought into charge to income tax, and therefore the appellants were bound to account to the Crown for the sum deducted for tax.

Decision of the Court of Appeal [1929] 2 K. B. 187 affirmed.

**Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD BLANESBURGH, and LORD ATKIN.

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APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The appellant Corporation appealed to the Special Commissioners against assessments to income tax made upon them for the three years ending April 5, 1922–1924, under the provisions of r. 21 of the All Schedules Rules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, in respect of certain sums of interest paid on money borrowed by the Corporation for the purpose of its Assisted Housing Scheme undertaken in pursuance of the provisions of the Housing, Town Planning, &c., Act, 1919. On making payments of such interest the Corporation had deducted income tax, and the question for the opinion of the Court was whether on the facts of the case and the law applicable thereto the Corporation was liable to account to the Inland Revenue Commissioners for the tax so deducted. The facts found by the Special Commissioners are fully set out in the report of the case before the Court of Appeal and are summarized in the headnote. The Commissioners held that the case was indistinguishable from *Dickson* v. *Hampstead Borough Council* (2), and their decision was affirmed first by Rowlatt J. and afterwards by the Court of Appeal (Lord Hanworth M.R., Lawrence and Sankey L.JJ.).

1929. Dec. 9, 10, 12. *Right Hon. H. P. Macmillan K.C.* and *Latter K.C.* (with them *Blanco White*) for the appellants. The question is whether the Corporation are bound to hand over to the Inland Revenue Commissioners the income tax deducted by them when paying interest on money borrowed by them for the purpose of this Assisted Housing Scheme prepared under the provisions of the Housing, Town Planning, &c., Act, 1919. Under the provisions of that Act and of the Housing of the Working Classes Act, 1890, all the expenses of the Corporation in consequence of the scheme are to be defrayed as part of the general expenses of their execution of the Public Health Acts. The Corporation have one fund

(1) [1929] 2 K. B. 187.

(2) (1927) 11 Tax Cas. 691.

only, the borough fund, and any deficiency in that fund is met by raising a borough rate. The general expenses of their execution of the Public Health Acts are paid from that fund. The Corporation own various profit making undertakings, the profits of which are paid into the borough fund. In each of the years in question the taxed profits of the Corporation's profit making undertakings exceeded the amount of the aggregate interest on loans payable by the Corporation, including the interest on loans under the Housing Scheme. Why then are they not entitled to treat the interest on the housing loans as paid out of their taxed profits? It is objected that the Corporation, under s. 7 of the Housing, Town Planning, &c., Act, 1919, and the regulations made thereunder, have been reimbursed by Parliament for the greater part of the loss incurred by them in carrying out the Housing Scheme—a loss mainly due to the interest on the housing loans—and that therefore the payment of the interest on these loans cannot be attributed to the borough fund generally, or to the profits forming part of that fund in particular, on the ground that it is specially and separately provided for. But the scheme has to be financed out of the borough fund, and there is no statute which precludes the Corporation from applying the taxed profits paid into that fund in payment of interest on these loans or which requires them to use the subsidy for payment of such interest. There was no earmarking of the subsidy for that purpose and, in the appellants' submission, it is applicable to making good the deficit in the borough fund. On this hypothesis the interest on the loans under the Housing Scheme was payable, and was in fact paid, wholly out of profits or gains brought into charge to tax, and consequently, under r. 19 of the All Schedules Rules, the Corporation were entitled, on making payment of such interest, to deduct and retain thereout the amount of tax thereon. It is not necessary to support the Corporation's right of retention that they should have specifically appropriated the taxed profits and gains to discharge such interest: *London County Council* v. *Attorney-General* (1); *Edinburgh*

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(1) [1901] A. C. 26.

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Life Assurance Co. v. *Lord Advocate* (1); *Sugden* v. *Leeds Corporation.* (2) The fact that separate Housing Scheme accounts are required to be kept for the purpose of calculating the amount of the Exchequer subsidy is not relevant to the question whether the interest on moneys borrowed for the Housing Scheme was payable or paid out of the taxed profits of the Corporation. *Dickson* v. *Hampstead Borough Council* (3), by which the Special Commissioners felt themselves bound, unless distinguishable, was wrongly decided.

Sir William Jowitt A.-G. and *Reginald Hills* for the respondents.

The interest upon which tax is claimed was not paid out of profits or gains brought into charge to income tax within r. 21 of the All Schedules Rules, but was paid out of the Exchequer subsidy. That was a subsidy in relief of the expenditure upon the Assisted Housing Scheme and not in relief of the borough fund generally. In the circumstances of the case the loans were not effectively charged upon the whole property of the Corporation, and the interest on the loans was in fact met out of the revenue of the Special Housing fund. *Dickson* v. *Hampstead Borough Council* (3) is directly in point and was rightly decided.

[They also referred to the second case of *Attorney-General* v. *London County Council* (4) and to Lord Haldane's statement of the principle of the Income Tax Acts in *Sugden* v. *Leeds Corporation.* (5)]

Right Hon. H. P. Macmillan K.C. replied.

The House took time for consideration.

1930. Feb. 27. LORD BUCKMASTER (read by VISCOUNT DUNEDIN). My Lords, the Attorney-General stated in his argument that this case could be confined in a nutshell. This may be true, but it is certain that when once liberated it assumed the dimensions of an Afrit and was equally difficult to recapture.

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(1) [1910] A. C. 143, 155, 163.
(2) [1914] A. C. 483, 503.
(3) 11 Tax Cas. 691.
(4) [1907] A. C. 131, 135, 137.
(5) [1914] A. C. 483, 490.

The issue arises out of an assessment to income tax of the Corporation of Birmingham, and for its explanation it is necessary to refer to a few facts which can be briefly stated.

The Corporation of Birmingham owns and successfully works certain public undertakings such as Gas, Water, Electricity, Tramways, etc., the profits from which are considerable; by virtue of some private Acts of Parliament all such profits are carried into one fund known as the borough fund, into which also are paid moneys levied by rates.

The Housing and Town Planning Act of 1919 provided by s. 7 that, in the case of a rehousing scheme carried out pursuant to its provisions by a local authority, the Local Government Board should, on certain conditions, all of which are satisfied in the present case, with the consent of the Treasury, pay to the local authority out of moneys provided by Parliament " such part of the loss as may be determined to be so payable under regulations made by the Board with the approval of the Treasury, subject to such conditions as may be prescribed by those regulations."

The section continued to define (in sub-s. 2) the scope of these regulations as follows: " Such regulations shall provide that the amount of any annual payment to be made under this section shall—(*a*) In the case of a scheme carried out by a local authority, be determined on the basis of the estimated annual loss resulting from the carrying out of any scheme or schemes to which this section applies, subject to the deduction therefrom of a sum not exceeding the estimated annual produce of a rate of one penny in the pound levied in the area chargeable with the expenses of such scheme or schemes; . . . ."

The regulations made under this section threw on the local authority (see art. IV.) the duty of keeping separate accounts to be called The Housing (Assisted Scheme) Accounts, including a separate revenue account to be called The Housing (Assisted Scheme) Revenue Account, and directed that such accounts should be prepared so that they should cause to be debited in each financial year: " (*a*) The sums required for interest and repayment of principal in respect of all moneys borrowed by them for the purposes of the assisted scheme (including moneys borrowed for the purchase of land which is approved by the Minister as part of the assisted scheme) which in the opinion of the Minister may properly be debited to the said account, ..."

The Corporation for the three years 1921–22, 1922–23, 1923–24 prepared accounts to satisfy the regulations showing serious deficits which were paid by the Exchequer, and it is in respect of the sums so paid that the claim for income tax has arisen.

The case of the Inland Revenue depends on the following facts: The Corporation raised loans to assist the scheme, and in their accounts each year brought forward as a debit item the gross amount of the interest they had paid on such loans, a sum which in each case was larger than the ultimate deficit. In fact, of course, they paid the interest after deducting the tax, and the Inland Revenue authorities contend that measured on the amount of the deficit the tax so retained must be paid over to them. The Commissioners, the learned judge who heard the appeal from their decision and the Court of Appeal have all supported this contention.

The Corporation argue that these decisions are wrong, because in their borough fund, out of which the payments for interest were made, there were large sums representing the profits on their undertakings which had already paid tax and that out of these sums they paid, as they were entitled to do, the interest on the loans. By this means the income tax in respect of the interest on the loans was discharged, because the moneys used for its payment had already paid tax under Sch. D. They say therefore that they thus properly paid the gross amount of the interest and were entitled to bring in the full sum as a debit in their accounts.

The right of the Corporation to pay interest on loans out of taxed profits and to deduct the tax in so doing is established by authorities that cannot be disputed and need not be discussed. For the curious in such matters the cases of *London County Council* v. *Attorney-General* (1);

(1) [1901] A. C. 26.

Attorney-General v. *London County Council* (1); *Sugden* v. *Leeds Corporation* (2) may be referred to.

But admitting this does not appear to me to solve the difficulty. The persons to whom the interest was payable are the persons whose income is to be taxed. If paid without deduction they could be assessed for the amount. If, however, paid out of profits taxed under Sch. D, the debtor can get a full discharge by paying the sum less tax. In such a case it is assumed he has paid the tax on behalf of his creditor, and the creditor, where entitled to abatement, can recover on this hypothesis. In the present case, if the accounts had brought in the actual sum paid no question would have arisen, but the accounts were prepared for a department of the Crown to whom, acting through another department, the tax was payable, and so regarded were prepared upon the footing that the tax was unpaid, with the result that either the creditor was still liable for the tax or that, if it had been deducted, it was retained to satisfy his liability in that respect.

The first hypothesis was not accurate and the other is the only one tenable.

The position may be put in other words. The Corporation by the accounts put forward for the purpose of obtaining and measuring the subsidy represented that the sum required for interest was the gross sum. If the interest was paid out of moneys already taxed this was not the sum required; they only required the lower figure. The statement therefore was equivalent to saying that the interest had not been paid out of moneys which had already paid tax. They cannot therefore now set up the contrary, but, if not so paid, the tax is still undischarged and it is in their hands for payment.

It is unnecessary to dwell on the results of the other contention, but it would appear and was indeed accepted that if it were correct the effect of the Act, the regulations and the circumstances was such as might cause part of the sum provided by the subsidy to be used in relief of the general rates.

(1) [1907] A. C. 131. (2) [1914] A. C. 483.

No doubt such a conclusion might be contained in words aptly devised for the purpose, but it can hardly have been the intention of the Act, and I can find nothing in this case to point to the conclusion that it was its consequence.

VISCOUNT SUMNER (read by LORD WARRINGTON OF CLYFFE). My Lords, if the interest on the Housing Bonds now in question was not payable or not wholly payable by the appellants out of profits or gains brought into charge, they were bound to deduct the tax, and thereupon they owed the sum so deducted to the Crown. If on the other hand it was so payable, then by reason of having paid it out of profits already brought into charge, the appellants would be entitled to keep the sum deducted. They did deduct it as tax gatherers for the Inland Revenue and they did keep it for themselves. The first question therefore is whether the interest was payable out of their taxed profits; the second whether they did so pay it. If it was not so payable, their present claim does not arise; if it was, but they did not so pay it, the obligation to deduct and to account for the sum deducted remains, for otherwise the interest would escape tax altogether. So far rr. 19 and 21 of the All Schedules Rules govern the matter.

The appellants make their recurring payments out of their statutory general fund, which is a common account, in and out, for all their receipts and payments. Enough money, received as taxable profits and so charged, had been previously paid in to enable the interest payments in question to be made out of it, but of course no actual destination of particular incoming sums to the satisfaction of particular payments out was feasible. The appellants claim to be now entitled to treat their payment of interest as if they had in fact earmarked enough of their chargeable profits, when received into the general fund, to satisfy the payments of interest falling due and to be thereafter paid. A series of decisions in your Lordships' House has laid down, not it is true in any case precisely the same as this, the conditions under which payments, neutrally made in fact, may be deemed to have

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been so made for income tax purposes and the effect of this assumption upon the disposal of the sums deducted from the payments of interest. I will spare your Lordships any citation of them, but they lay down a limitation on the right to do this, depending on its being lawful or legitimate to have made the payments out of such chargeable profits, if this had actually been done. This makes it necessary to consider the Housing Scheme, the Housing and Town Planning Act, 1919, under which the scheme was prepared, and the regulations duly made thereunder.

The appellants contend that there is nothing in this Act to defeat their right as generally laid down in the above decisions. It is true that no express words take the particular right away, and it is their argument that nothing less than express words will do; but, alternatively, they say also that there is no inconsistency between their enjoyment of this right and the scheme, provisions and purpose of the legislation in question. The scheme seems to contemplate that the houses, when built, may not and probably never will pay their way. There is no provision at any rate for such an event on the face of the Act. On the other hand careful provision is made as to the extent of the Ministry's liability in terms, which are vital on this appeal. The obligation, under which a subvention is to be paid out of moneys to be provided by Parliament, is contained in s. 7. If it appears that the carrying out of the scheme "has resulted or is likely to result in a loss," the Board is to pay such part of the loss as may be determined to be so payable under regulations made by the Board, and these regulations are required to provide, that the amount of any annual payment shall be "determined on the basis of the estimated annual loss resulting from the carrying out" of the scheme, "subject to the deduction therefrom of a sum not exceeding the estimated annual produce of one penny in the pound levied in the area chargeable," and in the regulations, which were made under the Act, art. IV. bound the appellants to keep separate accounts to be called "The Housing (Assisted Scheme) Accounts," including a separate revenue account to be called

"The Housing (Assisted Scheme) Revenue Account." The form of this account was prescribed, the credit side containing the proceeds of the penny rate and the rents collected with some smaller matters, and the debit side "the sums required for interest and repayment of principal in respect of all moneys borrowed by the appellants for the purposes of this scheme, the rates, taxes and rents payable by them in respect of any land or houses acquired," and sundry items of expenditure further specified.

My Lords, I think the scheme prescribed is clear. The housing undertaking is to be carried on by the appellants, though under ministerial supervision, and such efforts as there may be to make it pay must be made by them. The money required to finance the scheme is to be borrowed on their credit but, when the results of working are gathered in, they are to pay in the proceeds of the penny rate and the subsidy does the rest. As it seems to me, this express contribution out of public moneys by an actual subsidy must be exclusive of any implied right to lay hands on other public moneys by way of further contribution, in the form of a notional attribution of a particular part of their own undivided fund to the payment of this particular interest charge. The undertaking is at the risk of two parties, of whom the Ministry which pays the subsidy bears the less limited share, whether or not it eventually bears the greater amount of the loss, and the loss is one ascertained in the prescribed way upon a particular undertaking, which is their joint concern and is isolated from all other concerns by keeping the prescribed accounts separate from all other undertakings and concerns of the appellants. It is the amount required for interest and for repayment of principal that is to be debited, that is, the interest in full and not the sum actually paid to the bondholders, when adjusted to discharge what is in substance the bondholders' debt to the Inland Revenue. The regulations are not concerned with the appellants' functions as tax gatherers nor do they make any provision for the possible case of payment of the money in a manner specially beneficial to themselves. Suppose that the small incomings and the penny rate were just to balance the items on the other side. Upon the scheme there would then be no subsidy payable, but on the appellants' contention, if there was an apparent loss, due to and not exceeding the amount of the tax deducted, the subsidy would have to be called on to the extent of that loss, and yet the Crown would not receive the sums so deducted. I can find nothing in the Act consistent with this, yet this would be the result if this separate undertaking is to be influenced by rights, which arise partly under fiscal legislation that has nothing to do with the housing scheme, and partly under the mode in which, again under wholly independent legislation, the Corporation keeps its accounts.

My Lords, I put aside two matters of detail, which, as I think, cannot affect this wide distinction. In practice the Corporation pays the interest when due and subsequently completes the housing account and claims the subsidy over. I think, as Rowlatt J. thought, that this is mere financial accommodation, which cannot affect the case. Further, the accounts, when prepared, have to pass certain examinations and audits, for which the Act provides, and these accounts did so pass without objection. I can find nothing which, either by statute or common law, ousts the Crown from its right to the tax, if the right is otherwise complete. I am further of opinion that the comprehensive form in which the Corporation's bonds are expressed is not sufficient to make the interest an effective charge on the Corporation's general incomings within the cases that have been cited.

My Lords, I think that the whole scheme of the Housing Act, under which the Treasury participate with the Corporation in the ultimate outlay on working the scheme upon a method of calculation, which involves a debit of the gross interest paid, is inconsistent with the application of the Income Tax Rules, which the appellants assert, and it is therefore unlawful, in the sense of being negatived by the whole tenor of the Act, to retain the tax deducted. It is true that no words in the Housing Act expressly forbid it, for the settlement of other matters and accounts arising between the Corporation and the Inland Revenue was not within the purview of the Housing

Act, but I know of no authority for saying that this right of attribution can be defeated only by express words or for excluding from the exceptions out of this privilege something that is contrary to the general intention of a statute.

My Lords, it is true that under the All Schedules Rules in question the tax must be paid as well as payable, but I hesitate in this case to say that it has not been paid within the meaning of the rule, if the right of attribution referred to in your Lordships' decisions is applicable to the case. Neither as a matter of handing over identical currency nor of making specific appropriations in the books beforehand has there been any actual payment of the interest out of profits, but the decisions, I think, clearly contemplate that a mere attribution ex post facto, as part of a contention as to their rights, will serve the Corporation's turn without even an ultimate attribution in their books. Nor again do I see why the form of the housing accounts in any way closes the Corporation's mouth. They have not made a misrepresentation, for they have only made an entry which the regulation required them to make, nor do I suppose that any one ever was or ever was meant to be hoodwinked as to the facts. The question I think turns upon a claim of right. One statute directed the Corporation to deduct the interest, and in fact they did so; another directed them to bring the interest item into account at the gross amount, and so they did. Then came the present question—a separate one as I venture to think—can they successfully assert that they must be deemed to have paid the interest out of profits already brought into charge? In view of the Housing Act I do not think that they must be deemed to have done so, for that neither squares with the statutory relations resulting from this Act, nor is consistent with any tolerable working of it. I think that the appeal should be dismissed.

LORD ATKIN. My Lords, I agree that this appeal should be dismissed, but I desire to add a few words to define my reasons for coming to this decision. The case turns upon the words of r. 19 and the amended r. 21 of the general rules in the Income Tax Act of 1918. I need not read them; their legal effect on such a claim as this is to give rise to two questions which I will state as formulated by Lord Atkinson in *Sugden* v. *Leeds Corporation.* (1) "1. Have the interest and the annuities been, in fact, paid, or must they, in the circumstances of the case, be taken to have been, in fact, paid out of 'profits or gains brought into charge,' i.e., out of the so-called 'taxed fund'? 2. Was it lawful to pay them out of that fund?"

Rowlatt J. and the members of the Court of Appeal have, as it appears, answered both questions in the negative; but they have rather stressed the second question. They have accepted the contention of the Crown, that the effect of the Housing Act and the regulations made thereunder was to create a fund of which the subsidy formed an integral part, and that the payment of interest could only be made out of that fund. Alternatively it was said that the subsidy was "earmarked," or appropriated by statute to the payment of interest so that it was unlawful to use it for any other purpose. My Lords, I am not prepared to accept either view. I think that there was no fund created, certainly not actually, for by law there could be no fund except the borough fund, nor notionally, for the account to which so much importance is attached is an account and not a fund; a calculation and not a source of payment. In fact, the loss was incurred and in practice had to be incurred before the amount of the subsidy could even be ascertained, much less paid. Nor was there any earmarking. The statutory power to grant the subsidy is in the Housing, Town Planning, &c., Act of 1918, s. 7, sub-s. 1, which omitting immaterial words provides: "If it appears to the Local Government Board that the carrying out by a local authority of any approved scheme has resulted or is likely to result in a loss, the Board shall pay such part of the loss as may be determined to be payable under regulations." Such an obligation is common among individuals. A. promises B. expressly or impliedly that if B. will embark upon a particular venture A. will repay him the whole or part

(1) [1914] A. C. 483, 506.

of his loss. In ordinary circumstances no legal obligation rests upon B. to apply the money so paid to him by A. in any particular way. The result and the intended result is that A.'s own resources, from which he has met or is bound to meet the loss, shall be restored to the extent of the agreed payment. I see no reason for imposing any further obligation upon the parties in the present case. In view of the terms of payment in practice an obligation to pay only out of the subsidy seems impossible to carry out. If the case therefore turned only on the second question I should have come to the conclusion that it was lawful for the Corporation to pay out of their taxed funds. But the first question remains, did they in fact do so? As it was lawful for them to pay out of their taxed funds, so it was lawful for them to pay out of their untaxed funds. In both cases they must deduct the income tax; in the former case they could put it in their pocket, in the latter case they must account to the Crown. In the former case their loss caused by payment of interest would be limited to the nett amount paid; in the latter case it would extend to the full amount. But in preparing the account for the subsidy under the regulations they return the amount required for interest as the full amount without deduction; and they give no credit for and make no reference to the deduction. The account is prepared for the purpose of ascertaining the loss on the Housing Scheme, and in these circumstances it must, I think, be taken that the Corporation are representing that they are out of pocket the full amount of the interest, or, in other words, that they have no right to keep for themselves the income tax deducted. This can only be on the footing that they have in fact paid the interest out of their untaxed funds. I do not think that it is necessary to involve the principles of estoppel, even if the necessary conditions for an estoppel exist, as to which I say nothing. The effect of the form of the account, charging the gross amount of interest as an element of loss intended to result in receipt of a subsidy and followed by the actual receipt of the money based upon the representations contained in it, is to afford to my mind conclusive proof that the Corporation in fact paid the interest out of untaxed

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funds. If so, the assessments in question were correctly made. I think therefore that their appeal should be dismissed.

VISCOUNT DUNEDIN. My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Sumner, which has just been read; it exactly expresses the view I have formed of the case, and I concur in it. My noble and learned friend Lord Blanesburgh desires me to say that he concurs in the judgments just delivered.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 27, 1930.

Solicitors for the appellants: *Sharpe, Pritchard & Co., for F. H. C. Wiltshire, Town Clerk, Birmingham.*

Solicitor for the respondents: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

FRY . . . . APPELLANT;

AND

BURMA CORPORATION . . . . . RESPONDENTS.

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Revenue—Income Tax—Foreign Company—Transfer of Control to United Kingdom—Assessment to Income Tax—Mode of Computation—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Schedule D, Rule applicable to Case I.; Rules applicable to Cases I. and II., r.* 1, *sub-r.* 2.

A company incorporated in 1919 under the Indian Companies Act, 1913, had its registered office in Rangoon and was controlled from Burma. In 1925 it was resolved to transfer the control of the company and its registered office to London, and from July 1, 1925, the company became resident in the United Kingdom and assessable to income tax under Case I. of Schedule D of the Income Tax Act, 1918. An assessment for the year ending April 5, 1926, having been made on the company based on an estimate of the profits of the business from July 1, 1925, to April 5, 1926, under r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Schedule D, the company appealed to the Special Commissioners. The Commissioners found that the trade of the company was not set up and commenced in the year of assessment, as the company carried on the same trade as it had carried on since its incorporation in 1919, and they held that the assessment on the company for the year ending April 5, 1926, ought to be made in accordance with the Rule applicable to Case I. of Schedule D on the full amount of the balance of the profits and gains upon a fair and just average of the three years ending June 30, 1924, June 30 being the day on which the accounts of the company were usually made up:—

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, and LORD ATKIN.

Held, that the question whether or not the trade had been set up and commenced within the year of assessment within the meaning of r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. of Schedule D did not depend upon the transfer of the control of the company from Rangoon to London, and that the Commissioners were right in holding that the assessment should be made in accordance with the Rule applicable to Case I. The profits made in the three years preceding the year of assessment, although not taxable, could be used as a measure for the computation of the amount of the tax for the year of assessment on the basis of the three years' average provided by the Rule applicable to Case I.

Observations of Viscount Dunedin upon the practice of the legal advisers of the Crown in advising appeals to the House of Lords in revenue cases.

Decision of the Court of Appeal [1930] 1 K. B. 249 affirmed.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Lawrence and Russell L.JJ.) (1) reversing an order of Rowlatt J. whereby an appeal by the Crown on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was allowed and the decision of the Commissioners was reversed.

The facts are fully set out in the report of the case before the Court of Appeal and are summarized in the headnote.

1930. Feb. 24, 25. *Sir William Jowitt A.-G.* and *Reginald Hills* for the appellant. The question is whether the assessment of the respondent company to income tax under Case I. of Schedule D in respect of the profits and gains arising from the company's trade for the year ending April 5, 1926, has been rightly made under r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. or whether it should have been made on the three years' average basis under the Rule applicable to Case I. This question depends upon the meaning to be given to the words "the trade" in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. In *Colquhoun* v. *Brooks* (2) it was held by this House that notwithstanding the generality

(1) [1930] 1 K. B. 249.

(2) (1889) 14 App. Cas. 493.

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of the language of Schedule D, Case I. was not intended to apply to a trade carried on exclusively abroad by a person resident in the United Kingdom and that only so much of the profits as were received by him in this country was liable to tax under the head of foreign possessions in Case V. In the appellant's submission "the trade" in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. must bear the same meaning and must be confined to trade which is carried on wholly or partly in the United Kingdom. That trade was brought into existence for the first time in the year of assessment by the transfer of the control from Burma to England, and therefore falls within the words "set up and commenced within the year of assessment." There was no Case I. trade at all previous to the year of assessment. The Rule applicable to Case I. cannot apply, because it is not in accordance with the principles of the Income Tax Acts to adopt income derived from a source which does not fall within a particular category of taxation as the basis for estimating the income of a source which does fall within the category. The several categories are mutually exclusive: *Bradbury* v. *English Sewing Cotton Co.* (1)

Latter K.C. and *Raymond Needham K.C.* (with them *Ian C. Baillieu*) for the respondents. The word "trade" in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. must bear its ordinary meaning. There is no justification for inserting in that provision the words "in the United Kingdom." The duty of the Court is to interpret the provision as it stands: *Stevens* v. *E. Bousted & Co.* (2) The trade carried on by the company is, as the Commissioners have found, the same trade as before, and there is ample evidence to support that finding. The Rule applicable to Case I. exactly fits this case. The profits of the three years preceding the year of assessment are merely the measure of the profits of the year of assessment and are not themselves the subject-matter of the tax. *Bradbury* v. *English Sewing Cotton Co.* (3) is not opposed to the respondents' contention

(1) [1923] A. C. 744, 755–8.

(2) [1918] 1 K. B. 382, 386.

(3) [1923] A. C. 744, 752.

and it expressly recognizes the proposition laid down in *Singer* v. *Williams* (1)—namely, that "the fact that the income of a previous year is not taxable does not prevent it from being brought into computation for the purpose of assessing the tax payable in a later year and so being treated as a measure, though not as a ground for taxation."

Sir William Jowitt A.-G. replied.

[The following cases were also referred to: *Foulsham* v. *Pickles* (2); *Ormond Investment Co.* v. *Betts.* (3)]

1930. February 25. VISCOUNT DUNEDIN. My Lords, this is an appeal on a question of income tax which has arisen between H.M. Inspector of Taxes and the Burma Corporation, Ld., in these circumstances: The Burma Corporation is a corporation which existed and was created under the Indian Acts, and up till 1925 the company not only did the whole of its business, but managed the whole of its business, in Burma, although, as a matter of fact a very large proportion of its shareholders—the majority of them—were persons who lived in England. Of course, while it was in Burma the company, as a company, was not subject to income tax, though, naturally, the shareholders who received their dividends in this country would pay income tax upon them. In 1925 the company came to the conclusion that it would be more convenient for them to manage their business in England, and, accordingly, a change was made in the Directorate, which was largely increased by the addition of English directors, and a regular office was established in London. Now the effect of that, it is admitted, was to make the company resident in the United Kingdom, and as a person resident in the United Kingdom and carrying on a business elsewhere it became liable to income tax, and as to that there is no controversy between the parties. But the question that has arisen is as to what is to be done in the computation of the income tax for the first year of this changed management. The matter depends upon those well-worn sections of the

(1) [1921] 1 A. C. 41.
(2) [1925] A. C. 458, 468.
(3) [1928] A. C. 143.

Income Tax Act, which are as follows, under Schedule D: "1. Tax under this Schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing— . . . . (ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere." That is the section that hits the company. Then it goes on to say: "2. Tax under this Schedule shall be charged under the following cases respectively; that is to say,—Case I.—Tax in respect of any trade not contained in any other Schedule." I may mention at the moment, so as not to mention it again, although it does not apply here, Case V. is: "Tax in respect of income arising from possessions out of the United Kingdom." Then we come to the Rules applicable to Schedule D. The first is, "Rule applicable to Case I.: The tax shall extend to every trade carried on in the United Kingdom or elsewhere"—that, of course, fits this case—"other than a trade relating to lands . . . . directed to be charged under Schedule A, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April, preceding the year of assessment." If that stood alone, of course, no question could arise, but then when we come to the Rules applicable to Cases I. and II., r. 1, sub-r. 2, is: "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI."

Now the controversy that arises is this: The Commissioners took the view that the three years section applied, but the Crown said: "No, the three years section does not apply, what applies is this sub-r. 2 of r. 1 of the Rules applicable to Cases I.

and II." That depends upon whether, in the circumstances of this case, the trade has been set up within the said period of three years. Of course, it goes without saying that if sub-r. 2 applies it necessarily overrules what is under the first rule applicable to Case I. That is the question, and it is a very short question.

My Lords, I am bound to say that I do not think I have ever been called on to decide a more useless appeal than this appeal. I can quite understand that the Crown should bring to this House anything that raises a general question that is likely to affect the taxpayer one way or the other. It does not matter one whit which way this case is decided, because there is no general principle involved in it. The case is a very peculiar one, and not particularly liable to happen again, but, if it does happen again, nobody can tell whether it is for the interest of the Crown or for the interest of the taxpayer that the decision should be one way or the other. It all depends upon the particular figures. If the year in which the change is made as compared with the years before is a fat one the interest is one way, if it is a lean one the interest is the other. My remarks do not apply to the Attorney-General and Solicitor-General; they have far too much work to be able absolutely to advise as to all cases, but it really is high time—and I say this insistently—that those who advise the Crown in these matters should make up their minds that the Crown can be wrong, and not think it absolutely necessary to bring every case to this House, however trivial, simply because the Crown has been found wrong in that particular one.

My Lords, although I say that, it does not mean that this case is not arguable. It is arguable, and it has been remarkably well argued by the Attorney-General, and I say remarkably well argued because he has done what we in this House always like, that is, he has not troubled us with cases that do not apply. The books are full of such cases, and to a moderate extent one is accustomed to have them quoted, but here the Attorney-General at once went to the point, and said this really depends simply upon the construction of the words of the section.

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Now if one takes the section as it stands, it would not be supposed that there could really be any question about it. From what I said in the narrative, it will be seen that, as far as the trade itself is concerned, there has not been the slightest alteration; it goes on now exactly as it went on before, and the Commissioners have found, as a fact, that there is no alteration in the trade, and, therefore, prima facie one would suppose that there could be no question that this trade had not been set up or commenced within the period of three years, because it has been going for a great deal longer. But, in spite of that, there is an argument, an ingenious argument not easily to be put aside, which the Attorney-General has developed, and that argument depends upon the decision of this House in the well known case of *Colquhoun* v. *Brooks*. (1) Case I. is: "Tax in respect of any trade not contained in any other Schedule." The case of *Colquhoun* v. *Brooks* (1) decided that, although the word "trade" is a word of ordinary significance and would include every trade, yet its meaning where it is mentioned in Case I. is a trade that, partly at least, is exercised within the United Kingdom, and therefore the Attorney-General says the effect of *Colquhoun* v. *Brooks* (1) is that when you come to sub-r. 2 of r. 1 of the Rules applicable to Cases I. and II., the trade that has to be set up there is a taxable trade, a trade that under the decision of *Colquhoun* v. *Brooks* (1) could be taxed under Case I, and he says that taxable trade has only been set up for the first time when the company altered its direction and took it from Burma and brought it to England. My Lords, there is a great deal in that contention, and I confess I was at first inclined rather to think the Attorney-General had made out his point, but, on further consideration and certainly influenced by the fact that I know your two Lordships who are to follow me are of this opinion, I have come to the conclusion that, after all, it is really safest in this case to go by the ordinary meaning of the words. There is no absolute necessity for saying that "trade" in this sub-rule (which has not anything to do with charging, but is only saying what is the method of computation that has to be taken) is to be pinned down to the

(1) 14 App. Cas. 493.

exact meaning which it has under Case I., and it is safer to take the ordinary meaning of the word. If you take the ordinary meaning of the word, there is an end of the matter. I am quite aware that the question as to the ordinary meaning of the words came up in the case of *Colquhoun* v. *Brooks* (1), and, indeed, Lord Herschell in his judgment begins by confessing that that is so. In the case of *Colquhoun* v. *Brooks* (1) there was a real practical question of very great moment to be decided. It did not mean that the business there was going to escape altogether—not at all, because it came under Case V.; but at that time as the law then stood, it made this immense difference, that under Case V. you did not pay income tax on anything except what was actually remitted to the United Kingdom, and you did not pay on what was left out. That law has since been altered, and the case of *Colquhoun* v. *Brooks* (1) is in one sense of no practical importance; it has really come out of its grave to found the ingenious argument in this case. I do not think, therefore, that there is the same necessity, as there was in the case of *Colquhoun* v. *Brooks* (1), to search very carefully as between the possible meanings of the words. I think that on the whole it is safest to take the words as they stand in their natural meaning, and, if that is so, then it follows that the judgments of the Commissioners here and of the Court of Appeal are the right judgments.

My Lords, I say that the Attorney-General very rightly disregarded the cases, and there were only two that were mentioned. The one which seems to have had some force with Rowlatt J. was the case of *Bradbury* v. *English Sewing Cotton Co.* (2) I think that case does not apply, and the best way of showing that it does not apply is to read a short extract from the judgment of Lord Shaw in that case, in which he says: "It appears to me to be as contrary to law in principle to compel him to go through the confusing process of treating profits which have been already defined and taxed under one category as to be taken into account for the purpose of averaging under another category." That shows, I think, without any more, the complete dissimilarity of that case from this. The case of *Singer* v. *Williams* (1), which was also quoted, has no application, because there the whole matter was decided by the chapter and verse of the statute.

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(1) 14 App. Cas. 493.

(2) [1923] A. C. 744, 758.

My Lords, for these reasons I move that this appeal be dismissed with costs.

LORD WARRINGTON OF CLYFFE. My Lords, the question in this case is as to the mode in which income tax, admittedly payable by the respondent company on the profits arising from its trade, is to be computed. Is it to be on the average of three years, as provided by the Rule applicable exclusively to Case I. under Schedule D, or is it subject to r. 1, sub-r. 2, of the Rules applicable to Cases I. and II., and therefore to be computed in accordance with the Rules applicable to Case VI.?

On July 1, 1925, the respondent company, an Indian company carrying on a large trade in Burma, for the first time became liable to British income tax under Case I. of Schedule D. As from that date it became resident in England, and its trade was managed and controlled in this country. No break, however, occurred in the character of the trade itself, which continued to be carried on as before; this fact is found by the Commissioners in the Case stated.

My Lords, the material provisions of the Income Tax Act of 1918 are the following. There is, first, Schedule D: "Tax under this Schedule shall be charged in respect of—(*a*) The annual profits or gains arising or accruing . . . . (ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere." Then (2.): "Tax under this Schedule shall be charged under the following cases respectively;—that is to say,—Case I.—Tax in respect of any trade not contained in any other Schedule"; and "Case V.—Tax in respect of income arising from possessions out of the United Kingdom." Then there are the Rules applicable to Schedule D, and, first, there is a Rule applicable to Case I. by itself: "The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade"—which it is immaterial to mention—"and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April, preceding the year of assessment." Next there is one of the Rules applicable to Cases I. and II., that is to say, the second sub-rule of r. 1: "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI." The Rule applicable to Case VI. which it is sought by the Crown to apply to the present case is: "The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the Commissioners."

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(1) [1921] 1 A. C. 41.

Under the decision of this House in *Colquhoun* v. *Brooks* (1) it is admitted that prior to July 1, 1925, the company itself was not subject to tax on the profits of its trade, that trade, on what was there held to be the true construction of the Act, not being a trade within Case I. The shareholders, however, were, in accordance with the same decision, liable to tax under Case V. in respect of so much of the profits as might be remitted to them in this country as being profits arising from a foreign possession. Now, however, the company is carrying on a trade which comes within Case I.; it is resident in England, and is therefore itself liable to be assessed under Case I. Then arises the question: How is the tax to be computed? The general rule for the computation of the tax is the Rule applicable to Case I., which I have already read. That rule does not bring into tax any of the profits for the three years therein referred to, but merely provides a measure for the computation of the profits for the year of assessment. On this rule, taken by itself, no difficulty arises. The trade, the profits of which are to be ascertained, has been carried on for more than three years before the year of assessment, and the average of such profits could easily be struck. It is possible—I say no more, for this question is still open—that the Commissioners would properly assess the company in three-fourths of that sum, seeing that they are taxing profits for nine months only of the company's trade year, but that question is one which remains to be decided, and, as I say, so far as I am concerned I leave it quite open to the Commissioners to decide it according to whatever view they may take. But it is said that the general rule is excluded by the Rule applicable to Cases I. and II. —sub-r. 2 of r. 1 ; in other words, that the trade the profits of which are taxed was set up and commenced within the year of assessment. I feel great difficulty in coming to the conclusion that "set up and commenced" means brought within the orbit of taxation, or in reading "trade" in this context as meaning the trade now for the first time brought under the operation of Case I. or similar words. The trade has not altered its character ; not a single business transaction has taken place since July 1, 1925, which might not have taken place before that date. The Attorney-General says the trade must mean the trade now controlled in this country, and he says you must read "trade" throughout as if it has been qualified by some such words as "home" or "controlled in this country." I cannot adopt this view. The Legislature has employed a well known business expression : "Trade set up and commenced," and I think these words must have their ordinary business meaning. If so, this trade was set up more than three years before the year of assessment, and there is no ground for excluding the general rule. The cases cited seem to me really to have no bearing on the present question.

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(1) 14 App. Cas. 493.

My Lords, for these reasons I think the appeal fails, and should be dismissed with costs. I may say that I agree with what has been said by my noble and learned friend on the Woolsack as to the uselessness of this appeal.

LORD ATKIN. My Lords, the respondents in this case are a company registered under the Indian Companies Act, incorporated in 1919, having their registered offices in Rangoon and owning mines in Burma, from which they win lead, zinc and silver and dispose of the products apparently abroad. Until the year 1925 they were resident abroad in Burma, and they carried on the business of mineowners in Burma; that was their trade. In the year 1925, in July, they determined to transfer the control of the company to this country, which they did by merely passing a resolution increasing the number of their directors, so as to include a larger number of London directors, and passing a resolution that the board should be able to meet in London, so that thereafter, by the carrying out of that resolution, the affairs of this company were in fact controlled by a board of directors meeting in London. The result of that was, according to the decisions in this House, that this company became resident in this country, and the further result followed that the business of the company thereafter was at any rate partly carried on in this country. There seems to me to be no doubt at all that it was partly, indeed, I should have said mainly, carried on in Burma, but it was partly carried on in this country. There is on the Case stated no evidence as to whether or not it may not have been carried on partly in this country before July, 1925, but I think for the purpose of this case it is safe to assume that the real facts were that for the first time the business of this company was partly carried on in London from July, 1925.

The question then arises: In what circumstances and to what extent is it to be assessed to income tax? Being a resident in this country, it obviously for the year 1925–26 for the first time became taxable, and it became taxable under the terms of Schedule D of the Act of 1918, which prescribes: "Tax under this Schedule shall be charged in respect of the annual profits or gains arising or accruing . . . .

(ii.) to any person residing in the United Kingdom from any trade, profession or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere." The tax is to be charged under the following cases—namely, Case I.: "Tax in respect of any trade not contained in any other Schedule," and the Rule applicable to Case I. is: "The tax shall extend to every trade carried on in the United Kingdom or elsewhere"—omitting immaterial words—"and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment." The respondents submit to be taxed on that footing, and they say that they are entitled to be taxed under the Rule applicable to Case I. upon an assessment which has to be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on the day of the year on which the accounts of the trade have been made up. The Crown, on the other hand, say that is not the position and that the respondents ought to be taxed under r. 1, sub-r. 2, of the Rules applicable to Cases I. and II., which provides that: "Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years"—that is the average period—"the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI." I do not pause for the moment to discuss what those rules are. The Crown therefore say that the result of transferring the control of the trade to this country so that from that date the trade was partly carried on in this country, was to set up and commence the trade within the year of assessment. My Lords, that involves, partly, no doubt, a question of construction, but when the construction has been determined it seems to me

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to raise a question of fact. What is the meaning of the words "set up and commence" the trade? It is said by the Attorney-General that the words must be construed in reference to the whole of this Schedule and the Cases and rules made thereunder, and I entirely agree with that view—I think that is so. Then it is said you must give the same meaning throughout the Schedule and the Cases and the rules to the same words, and I agree that, unless the context makes it impossible to do so, you ought to give the same meaning to the words.

Then if you look to see what the rules and the Cases are dealing with, the matter seems to be this. You are to tax only profits or gains, which is the first point. They must accrue to a person residing in the United Kingdom in respect of this matter on which they are charged; and they must accrue to a person residing in the United Kingdom from any trade carried on in the United Kingdom or elsewhere. The words "or elsewhere" have been limited by the case of *Colquhoun* v. *Brooks* (1), and those words, though they seem to have a simple meaning, must be construed, in reference to the territorial limit of taxing jurisdiction and to the other provisions of the Act, as only applicable to trade carried on in the United Kingdom, or partly in the United Kingdom and elsewhere; and we must accept that view. But it seems to me the word "trade" has still the same meaning throughout the Act. "Trade" refers to the various activities of commerce—the winning and using the products of the earth, or multiplying the products of the earth and selling them, or manufacturing them and selling them, the purchase and sale of commodities, or the offering of services for a reward, such as conveyance and the like. To my mind, throughout the Act there is only one meaning to be attached to the word "trade." Trade may or may not become taxable in accordance with the provisions of the Act, and, in this particular case that we are dealing with, the trade of a person will not be taxed unless that person is resident in the United Kingdom.

(1) 14 App. Cas. 493.

There is another matter which it is unnecessary to dispose of, which is on the other part of the Schedule which provides that if a trade is carried on in this country and profits accrue to a non-resident from such trade, those profits are taxable; but we are not concerned with that case.

My Lords, in view of those circumstances, what is the position here? Are these persons carrying on a trade in the United Kingdom, and are they entitled to have it computed on the full amount of the balance of the profits or gains for three years? It appears to me that they come within every word of that Rule applicable to Case I.; they are carrying on a trade and they would be entitled to computation on the three years' average. The only objection that can be made to that claim appears to me to be, as far as it turns on those words, the suggestion that you cannot use profits of a trade which existed at a time when the trade was not taxable in this country to arrive at an average for the purpose of computing the profits of a year when it is taxable. That appears to me to have no authority at all to support it; indeed it seems to me to be entirely contrary to the decision in *Singer* v. *Williams* (1) and the statement of the Lord Chancellor, and to have no support at all from the *Bradbury* case. (2) There is no reason why, if the trade still continues, the profits made at the time when it was not taxable should not be taken into account for the purpose of computing profits in a year when it is taxable.

The other view put forward by the Crown was this: It was said that whatever may be the construction of the Rule relating to Case I., there is an express rule relating to Cases I. and II. which deals with the tax on a trade being set up and commenced within the year of assessment. Now in respect of that I venture to think the conception of setting up and commencing a trade is a very simple one, and I should have thought that on the ordinary use of the language there could be no doubt about it. In that I rather concur with an expression used by Russell L.J. (as he then was) in the Court of Appeal. To set up and commence a trade seems

(1) [1921] 1 A. C. 41.

(2) [1923] A. C. 744.

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to me to mean to bring into existence for the first time those activities, which I have just described, which constitute trade; they relate to acts done for the first time to enable a person to engage in manufacture, barter, or profitable services such as I have dealt with. They do not appear to me to convey the idea, which is suggested by the Crown, that the trade becomes for the first time taxable in this country. That is an idea which I think is very easy to express, and certainly it is a very remarkable way of expressing it to use the words "set up and commence the trade." I have said that the question may become a question of fact, and I think it may. It may very well be that the activities which are being indulged in in the way of trade may be so altered in their nature, in their geographical disposition, or possibly in the way of their control that the trade, which had been originated before the change, has changed its character and a new trade is brought into existence; but that seems to be a question of fact, and in this case we have the finding of the Commissioners, which appears to me to be conclusive, that the alteration which was made in the control of this business by altering the number of the directors and by arranging that the board henceforward should meet in London and not in Rangoon, and from London control the operations of the company, which otherwise continued unchanged in Burma, did not amount to a change in the trade.

My Lords, in those circumstances it appears to me that the Crown do not bring the case within the Rule applicable to Cases I. and II., but the case remains within the Rule applicable to Case I., and the profits fall to be computed upon a fair average of the last three years. I pass no opinion at all upon the question of whether or not that involves that this company, which is now resident in this country, will have to pay on the full year's profits, or on an apportioned average; that will be a matter which will have to be the subject of further adjustment.

My Lords, in his forcible reply made this morning the Attorney-General referred to the consequences that might befall a taxpayer if this construction were adopted, that is to say, if the taxpayer instead of beginning a trade in this sense, discontinued or ceased to carry on a trade. I am not myself at the present moment satisfied that the difficulties and inequalities which he suggested would really fall out to be quite as serious. That is a matter that would no doubt require further discussion, and it is not before us. In any event, it would not appear to me to be effective to alter what in my view is the plain meaning of quite simple business words used in this connection, and I may perhaps conclude by saying that, if the inequalities and injustices are as great as the Attorney-General points out, the Government have legal advisers who will be able to put them in a position to correct those obvious injustices and inequalities if they really follow from the words as construed by this House.

My Lords, I agree with the words that have fallen from the noble Viscount on the Woolsack and that this appeal should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Feb. 25, 1930.

Sir William Jowitt A.-G. My Lord, in view of certain observations which fell from your Lordship which were not put to me in the course of the argument, I think it fair, particularly as your Lordship was good enough to indicate that I personally was not implicated and that others were, to say that the amount involved in this case is very large indeed and this case governs other cases, and the appeal is being taken for that purpose. Your Lordships were not aware of those facts.

VISCOUNT DUNEDIN. I still stick to my opinion. The Court of Appeal is the Court of Appeal, and this case raises no general question in this sense, that you yourself very candidly said you cannot tell whether it is for the interest of the taxpayers as a whole whether the case shall be

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decided in the one way or the other. I keep to my observations. I might have to repeat them, but I do not say so necessarily, because I quite see that, if there is a question of general importance, then, no matter how the decision is, it is for the Crown to go on, but I do notice that there are seven cases in the paper and in five of them the Crown is appellant. I shall watch with interest what these cases are.

Sir William Jowitt A.-G. My Lord, I thought I ought to point that matter out to your Lordship, particularly in view of the fact that the learned trial judge decided in our favour.

VISCOUNT DUNEDIN. You have not disturbed my observations.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitors for the respondents: *Birkbeck, Julius, Edwards & Co.*

[HOUSE OF LORDS.]

STANYFORTH AND ANOTHER . . . . APPELLANTS; H. L. (E.)*

AND 1930

COMMISSIONERS OF INLAND REVENUE RESPONDENTS. *March* 13.

Revenue—Stamp Duty—Voluntary Disposition inter vivos—Resettlement of Real Estate—Overriding Power of Revocation and new Appointment—" Value of the property conveyed and transferred "—Method of Valuation—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 74.

By a deed poll dated in 1911 a partial resettlement was effected of the Portman family estates. The deed poll was executed under a joint power of revocation and new appointment contained in previous dispositions of the estates and the appointment thereby made was expressly subject to a further exercise of such power; and the deed poll itself also contained a fresh power of revocation and new appointment. In arriving at the value of the property transferred by the deed poll for the purpose of assessing the ad valorem stamp duty payable thereon under s. 74 of the Finance (1909–10) Act, 1910, the Inland Revenue Commissioners disregarded the powers of revocation and new appointment:—

Held, that these overriding powers ought to have been regarded as affecting the value.

Earl of Westmorland v. *Inland Revenue Commissioners* [1928] 1 K. B. 703 overruled.

Decision of the Court of Appeal [1930] 1 K. B. 58 reversed.

APPEAL from an order of the Court of Appeal affirming an order of Rowlatt J. (1) upon a case stated by the Inland Revenue Commissioners under s. 13 of the Stamp Act, 1891, with reference to the amount of stamp duty chargeable under s. 74 of the Finance (1909–10) Act, 1910, on a deed poll dated September 16, 1911, under the hands and seals of the second Viscount Portman and the Hon. Henry Berkeley Portman.

By this deed Viscount Portman and his eldest surviving son Henry, who were the first and second tenants for life of the Portman settled estates, in exercise of a joint power of revocation and new appointment vested in them under a previous settlement, effected a partial resettlement of the family estates. Shortly stated the effect of the resettlement was to cut out the interests of Viscount Portman's second surviving son Claud and his issue and to accelerate the interests of the remaindermen who were postponed to Claud and his issue. The appointment effected by the resettlement was made subject to all powers of revocation and new appointment, which powers were thereby preserved and were intended to override all the provisions effected by the resettlement, and the deed of resettlement also contained a power of revocation and new appointment.

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, and LORD ATKIN.

(1) [1930] 1 K. B. 58.

The facts are fully set out in the report of the case in the Courts below.

The Commissioners were of opinion that the resettlement operated as a voluntary disposition inter vivos, and this was not now seriously contested. They were further of opinion that in arriving at the value of the property conveyed or transferred by the resettlement the overriding powers of revocation and new appointment were to be disregarded and that the value of the property conveyed equalled the difference between what Claud had before and after the resettlement, and on that basis they valued the property at 1,990,700*l.* and assessed the ad valorem duty on the resettlement, in addition to the fixed duty of 10*s.*, at 19,907*l.*

The appellants, the trustees for the purposes of the Settled Land Act of the Portman settled estates, objected (inter alia) that the overriding powers of revocation and new appointment had to be taken into account and that these powers had the effect of reducing the value of the property conveyed or transferred to a nominal sum, and the Commissioners admitted that the value of the expectant reversionary interests of which Claud and his male issue were deprived, if sold at the date of the resettlement in the open market subject to the overriding powers of revocation and new appointment, did not exceed a nominal sum, which the Commissioners were prepared to agree at 50*l.*

Rowlatt J. held that the case was covered by *Earl of Westmorland* v. *Inland Revenue Commissioners* (1) and confirmed the assessment, and the Court of Appeal by a majority

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(Lord Hanworth M.R. and Slesser L.J.; Lawrence L.J. dissenting) affirmed his decision.

The arguments on the appeal to this House were substantially the same as in the Court of Appeal, the only difference being that the appellants on the present appeal contended that the decision of the Court of Appeal in *Earl of Westmorland* v. *Inland Revenue Commissioners* (1) was erroneous and ought to be overruled.

1930. Feb. 25, 27. *Latter K.C.*, *Gavin Simonds K.C.* and *F. McMullan* for the appellants.

Sir William Jowitt A.-G. and *J. H. Stamp* for the respondents.

The House took time for consideration.

1930. March 13. LORD WARRINGTON OF CLYFFE. My Lords, the question in this appeal is as to the amount of the ad valorem stamp duty under s. 74 of the Finance (1909–10) Act, 1910, payable in respect of a deed poll dated September 16, 1911, whereby a partial resettlement of the Portman family estates in Dorset, London and Middlesex was effected. The deed poll was executed under a joint power of revocation and new appointment contained in previous dispositions of the estates, and the appointment thereby made was expressly subject to a further exercise of such power and the deed poll itself also contained a fresh power of revocation and new appointment. The question is whether in assessing the value of the property conveyed or transferred by the deed poll the Commissioners of Inland Revenue were justified in disregarding as they did the powers of revocation and new appointment.

The Commissioners assessed the duty at 19,907*l.* They were required to state a case for the opinion of the Court, and it is on the case so stated that the question is to be determined.

The case came on for argument before Rowlatt J., and by his order dated March 19, 1929, he confirmed the assessment of the Commissioners.

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(1) [1928] 1 K. B. 703.

Lord Warrington of Clyffe.

The Court of Appeal on June 28, 1929, by a majority (the Master of the Rolls and Slesser L.J.; Lawrence L.J. dissenting) dismissed the appeal. The appellants (the trustees of the Portman Estates) appeal to this House.

There are no facts or figures in dispute, and the question is purely one of principle depending on the true construction and effect of s. 74 of the Act above referred to.

The material part of the section is in the following terms: "Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale, with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale."

The words themselves seem simple enough, and as applied to the transfer of an item of property such as a piece of land in fee simple or a sum of stock they present no difficulty. It is when they have to be applied to a complicated instrument such as the present effecting a partial resettlement of family estates that questions arise.

By the settlement of June 27, 1870, the estates were limited to uses in strict settlement in favour of the successive members of the family in the manner usual in such cases. The deed contained a power for the persons therein named by deed to revoke and make void all or any of the uses, trusts, powers and provisions therein expressly or by reference declared and contained of and concerning the settled premises or any other hereditaments which might be settled or subject for the time being to the uses or trusts thereof or of and concerning any part or parts of the same hereditaments, and by the same or any other deed or deeds to limit, declare or appoint any other uses, trusts, powers, limitations or provisions of or concerning the said settled premises or other hereditaments the uses and trusts whereof respectively should be so revoked as aforesaid which they should think fit.

In every subsequent deed modifying the provisions of this settlement, of which there were several, there was inserted a similar power of revocation and new appointment. At the date of the deed in question the then subsisting power was vested in the then Viscount Portman and the Hon. Henry Berkeley Portman, his eldest surviving son. The effect of this deed on the then existing limitations of the estates is explained fully in the case stated by the Commissioners. Stated shortly, by eliminating the interests of Claud Berkeley Portman and his issue it accelerated those of persons who under the then existing limitations were postponed to Claud and his issue. The Commissioners came to the conclusion that the value of the property then transferred was equal to the difference between what Claud and his issue had (1.) before and (2.) after the resettlement, which difference was by the resettlement transferred from Claud and his issue to other persons. On this footing the value of the property conveyed or transferred is the agreed figure of 1,990,700*l.*, and the ad valorem duty is the 19,907*l.* above mentioned. In arriving at this value, however, the Commissioners disregarded the powers of revocation and new appointment.

After the execution of the deed these powers were twofold (1.) the power annexed to the uses prior to that of Claud and (2.) a fresh power reserved to the appointors and the survivor of them and any person of full age entitled presumptively or otherwise to the London and Middlesex estates in remainder immediately expectant on the death of such survivor. The first of these powers was expressly preserved, and it was declared that it was intended to override all the uses, powers and provisions created by the deed.

The Commissioners, having assessed the duty in the manner stated above, after referring to the appellants' contention that in valuing the property for the purpose of s. 74 of the Act the overriding powers of revocation and new appointment have to be taken into account, and that these powers have the effect of reducing the value of the property conveyed or transferred to a nominal sum, and that the ad valorem duty should be assessed at 10*s.*, proceed to find as follows: "The Commissioners admit that the value of the expectant reversionary interests of which Claud Berkeley Portman and his male issue were deprived as aforesaid, if sold at the date of the resettlement in the open market subject to the overriding powers of revocation and new appointment vested in other persons by which they were liable to be defeated, did not exceed a nominal sum which the Commissioners are prepared to agree at 50*l.*"

The contest therefore is between an ad valorem stamp of 19,907*l.* and one of 10*s.*, the amount of the duty on a value of 50*l.*

Ought the Commissioners to have taken into account the overriding powers of revocation and new appointment ?

I agree with the Crown that the deed in question operated as a voluntary disposition inter vivos. The next point is what is the property conveyed or transferred ? Here again I think it is clear that it consists of the property the subject of the transfer—namely, in this case those interests of Claud and his issue which in effect were transferred to the persons who came after him in order of succession. Then how is the value of the property so transferred or conveyed to be ascertained ? It is to be substituted for the amount of the consideration for the sale had the deed been a conveyance or transfer on sale. The Commissioners indicate, and I think rightly, the kind of sale they have in mind when they refer in clause 12 of the case to the " market value " and in clause 14 quoted above to " a sale in the open market." At such a sale the property would have to be put up with all its incidents, including provisions for defeasance either in whole or in part, powers vested in persons not controlled by the vendor to create charges taking precedence of the property sold, and so forth. I really fail to understand, with all respect to those who have taken a different view, how the most drastic power of destroying the property to be sold vested in persons over whom the purchasers would have no control could properly be disregarded. But it is said the donees are members of the family, and, if asked what they would give, would not have been affected by the fear of a subsequent exercise of the power. I cannot follow this. Facts might have been found and in another case may be found tending to show that the present arrangement might fairly be regarded as final, and I desire to leave open the question what might be properly done in such a case, but this was not the case here; on the contrary, since the execution of the settlement of 1870 there have been several exercises of the power, and care has always been taken to preserve or renew it to the full extent. In my opinion, therefore, the overriding powers ought to have been regarded as affecting the value, and that being so there is no alternative other than the 50*l.* to the value accepted by the Commissioners. The Crown naturally relied upon the decision of the Court of Appeal in *Earl of Westmorland* v. *Inland Revenue Commissioners.* (1) In that case the only power of revocation was one contained in the conveyance or transfer itself. In my opinion this cannot make any difference. If I am right that "the property" in the section means "the subject-matter of the conveyance or transfer," this subject-matter is as much affected in value by a power of revocation contained in the deed of conveyance or transfer as in some other deed. I think this case ought to be treated as overruled, and that the judgment of Lawrence L.J. in the present case was right. I think the appeal ought to be allowed with costs, and the matter remitted to the Commissioners with directions that the ad valorem stamp be adjudged to be 10*s.* and no more. The 19,907*l.* has been paid under protest; I assume it will be returned without an order to that effect.

LORD ATKIN. My Lords, I have had an opportunity of reading the judgment which has just been given by my noble and learned friend, Lord Warrington, and I entirely concur with it and find it unnecessary to add any reasons of my own.

VISCOUNT DUNEDIN. My Lords, I concur in the judgment which has been read by my noble and learned friend Lord Warrington.

Order of the Court of Appeal reversed and case remitted back to the Commissioners of Inland Revenue with a direction to find the ad valorem

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(1) [1928] 1 K. B. 703.

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stamp duty ten shillings and no more. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 13, 1930.

Solicitors for the appellants: *Wilde, Wigston & Sapte.*

Solicitor for the respondents: *The Solicitor of Inland Revenue.*

[PRIVY COUNCIL.]

J. C.*
1930
Feb. 25.

KHOO HOOI LEONG . . . . APPELLANT;

AND

KHOO CHONG YEOK . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (PENANG).

Straits Settlements—Chinese Residents—Legitimacy—Chinese Custom—Legitimation by Recognition—Custom repugnant to English Law—Alleged Presumption from Recognition—Modification of English Law in application to alien races.

The Chinese custom of legitimation of a natural son by subsequent recognition is not part of the law of the Straits Settlements in relation to Chinese people there domiciled; nor does recognition as a son raise a presumption that the son's mother was a t'sip, or secondary wife.

The modifications of the law of England which obtain in the Colony in its application to the various alien races established there arise from the necessity of preventing the injustice or oppression which otherwise would ensue. It is from that necessity that the status of t'sips, and consequently the legitimacy of their offspring, have been recognized; but there are no grounds which would justify treating an illegitimate natural son as legitimated by the mere fact of subsequent recognition.

Judgment of the Supreme Court of the Straits Settlements affirmed.

APPEAL (No. 82 of 1929) from a decree of the Supreme Court of the Straits Settlements (August 11, 1928) affirming a decree of Sproule J. (February 22, 1928).

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* *Present:* LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, and LORD RUSSELL OF KILLOWEN.

The question arising upon the appeal was whether the appellant's father, Khoo Hun Tee, was a legitimate son of Khoo Thean Tek, a wealthy Chinese resident of Penang, who died in 1890. The appellant claimed that his father was within the class "my sons and grandsons," who were beneficiaries under a settlement of land at Penang executed by Khoo Thean Tek in 1888. That claim was before the Judicial Committee in an appeal reported at [1926] A. C. 529. Under the judgment of the Board an inquiry, which had been directed by Sproule J. in the terms "whether the said Khoo Hun Tee was a legitimate son of the settlor," was ordered to proceed.

The facts material to the appeal are stated in the judgment of the Judicial Committee.

Upon the inquiry the registrar found that Khoo Hun Tee's mother, Petronella, was a t'sip or secondary wife of the settlor; and that even if she was not, Khoo Hun Tee was a legitimate son of the settlor by recognition.

Upon a summons to discharge or vary the registrar's certificate Sproule J. made a decree that Khoo Hun Tee was not a legitimate son of the settlor. The learned judge held that the law as to Chinese secondary marriages required that the woman should be soluta, free to marry, and that there should be an element of permanence in the union. Upon the evidence he found that neither of those requirements were satisfied, and consequently that Petronella was not a t'sip. With regard to the alternative finding, he held that the custom of legitimation by recognition, which was repugnant to the law of England, did not operate in the colony; he said that it was settled law there that adopted sons of Chinese did not share upon an intestacy, although according to Chinese custom they would do so.

Upon appeal the decree was affirmed. Thorne J., with whose judgment Pritchard J. agreed, held that Khoo Hun Tee could not be treated as a legitimate son of the settlor, as under s. 112 of the Straits Settlement Evidence Ordinance he was to be regarded as the son of Petronella's husband Gaudoin. Stevens J., while agreeing with that view, held further, agreeing with the judgment of Sproule J., that legitimation by recognition formed no part of the law operating in the Colony.

1930. Jan. 23, 24. *Dunne K.C.* and *F. O. Langley* for the appellant. Expert evidence called at the trial established that according to Chinese customary law a natural son could be legitimated by recognition; the expert witness stated that the evidence of recognition in the present case sufficed for that purpose under the custom. Effect should have been given to that custom. The common law of England was introduced into the Straits Settlements, as it was into India, only so far as it did not conflict with local custom. The judgment of the Board in *Yeap Cheah Neo* v. *Ong Cheng Neo* (1) states that the law of England prevails in the Colony only "so far as it is applicable to the circumstances of the place, and modified in its application by these circumstances." In *Cheang Thye Phin Neo* v. *Tan Ah Loy* (2) the Board gave effect to the decision in *Choo Eng Choon* v. *Neo Chan Neo* (3) (known as *The Six Widows*' case), which recognized the legal status of t'sips, and in the former appeal in the present matter, *Khoo Hooi Leong* v. *Khoo Hean Kwee* (4), the legitimacy of the offspring of a t'sip was recognized. The custom now contended for is not more inconsistent with English law than are those modifications. Further, the recognition of the appellant's father as a son raised a rebuttable presumption that he was legitimate and that his mother was a t'sip. The custom is similar to that among Mahomedans, and in British India recognition of a son by a Mahomedan raises a presumption that he is legitimate and that the union with his mother was lawful: *Sadik Husain Khan* v. *Hashim Ali Khan* (5); *Habibur Rahman Chowdhury* v. *Altaf Ali Chowdhury*. (6) The presumption necessarily arises in the case of people among whom secondary marriages are valid, and there is a custom of legitimation by recognition. The evidence was not inconsistent with Petronella being a t'sip of the settlor; and, having regard to the presumption, it was for the respondent to prove that Petronella's husband, of whose existence after 1847 there is no evidence, was alive at the time of Petronella's association with the settlor. So too s. 112 of the Evidence Ordinance applies in terms only in the case of "a person born during the continuance of a valid marriage," and it was for the respondent to show that the marriage of Petronella and Gaudoin was continuing at the date of the birth of the appellant's father. The ostensible relations of the settlor and Petronella should be referred to a legitimate and correct connection, rather than to an illegitimate one: *Yeap Cheah Neo* v. *Ong Cheng Neo.* (1)

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(1) (1875) L. R. 6 P. C. 381, 393.
(2) [1920] A. C. 369.
(3) (1908) 12 S. S. L. R. 120.
(4) [1926] A. C. 529.
(5) (1916) L. R. 43 I. A. 212.
(6) (1921) L. R. 48 I. A. 114.

Gavin Simonds K.C. and *Greenland* for the respondent. There was no evidence to show that Petronella was a t'sip of the settlor; the facts that she was a Eurasian Christian, and that she had an illegitimate child in 1856, are inconsistent with her being so. Further, according to Chinese custom, she could not be a t'sip if she was a married woman. She married Gaudoin in 1847, and in the absence of evidence to the contrary he is to be presumed to have been alive at the date, about 1853, of Petronella's association with the settlor: *Wilson* v. *Hodges* (2); Evidence Ordinance, s. 114. There is no conflicting presumption, because her association with the settlor was not bigamous. It is conceded that the evidence in the case established the Chinese custom as to legitimation by recognition, but it is not part of the law in the Colony that a person by recognition as a son acquires civil rights in relation to succession. It has been settled law in the Straits Settlements since the decision in *Reg.* v. *Willans* (3) in 1858 that an adopted son of a Chinese has no rights upon an intestacy, and it has not hitherto been suggested that the custom of recognition operates. It is a fundamental rule that the law of succession should be certain. No doubt it would be open to the Supreme Court to give effect to a Chinese custom in modification of English law, in

(1) L. R. 6 P. C. 381, 386.
(2) (1802) 2 East, 312.
(3) (1858) 3 Kyshe, 16.

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addition to the two well marked modifications already introduced, if it appeared necessary to do so, and it would be for the Judicial Committee to approve or disapprove; but it is submitted that the Board should not of its own motion introduce a new modification of English law. [As to the principle applicable reference was made to *Yeap Cheah Neo* v. *Ong Cheng Neo* (1); *Reg.* v. *Willans* (2); *Choa Choon Neoh* v. *Spottiswoode* (3); *Lee Joo Neo* v. *Lee Eng Swee* (4); and Braddell's Law in the Straits Settlements (Singapore, 1915), p. 86.] As English law has already been modified in the case of Chinese residents by recognizing the validity of secondary marriages, and the legitimacy of the offspring of them, further (in the *Six Widows*' case (5)), by holding that a child may be legitimated per subsequens matrimonium, no injustice arises from the decision not to give effect to the custom contended for, which seriously conflicts with the principles of English law. The recognition of Khoo Hun Tee cannot give rise to a presumption that Petronella was a t'sip, because the evidence is that the custom operates independently of the status of the mother. The custom was relied on because Petronella was not a t'sip. If the presumption arises it was rebutted in that both Courts rightly held that she was not, and could not have been a t'sip.

Dunne K.C. in reply. The appeal being as to status the concurrent findings are not conclusive. A t'sip can be put away at any time: *Six Widows*' case. (5) That is material in considering whether Petronella was a t'sip. The question as to the effect of recognition could not arise until after 1908, when that case was decided. The principle of adoption, or of recognition as a son, does not supersede English law: *Khoo Tiang Bee* v. *Tan Beng Gwat.* (6)

Feb. 25. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. This appeal is brought from a decree of the Supreme Court of the Straits Settlements dated August 11, 1928, by which an appeal from a decree (dated February 22, 1928) of Sproule J. was dismissed. This last mentioned decree was made upon the further consideration of an action and upon a summons to vary a certificate made therein by the registrar in answer to an inquiry which had been ordered by the judgment in the action. The inquiry was framed in the following terms: " An inquiry whether the said Khoo Hun Tee was a legitimate son of the settlor." The settlor was one Khoo Thean Tek, and he is referred to hereinafter as the settlor.

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(1) L. R. 6 P. C. 381.
(2) 3 Kyshe, 16, 34, 38.
(3) (1869) 1 Kyshe, 216, 221.
(4) (1887) 4 Kyshe, 325.
(5) 12 S. S. L. R. 120.
(6) (1877) 1 Kyshe, 413.

By his certificate the registrar had found that Khoo Hun Tee was a legitimate son of the settlor. Sproule J. reversed that finding, and declared that Khoo Hun Tee was not a legitimate son of the settlor. The Appellate Court affirmed the decision of Sproule J.

The effect of the decision of Sproule J. and the Appellate Court is to exclude Khoo Hun Tee from the class of " my sons and grandsons " who are to take as beneficiaries under the trusts of a settlement of land in Penang executed by the settlor on December 8, 1888. Their Lordships, however, are not concerned with any question either as to construction or otherwise arising under this settlement. They have only to determine whether the decision under appeal is or is not correct.

Most of the relevant facts are not in dispute. The settlor was a Chinese domiciled in Penang, who had in addition to a t'sai, or principal wife, one or more t'sips, or lawful secondary wives. During some period of time (the extreme limits of which are stated later) he was in sexual association with a woman named Petronella, who as a result of this association gave birth to Khoo Hun Tee on January 22, 1854.

As to Petronella, she was born in Penang and was baptized on June 26, 1831, at the Catholic Church of the Assumption in the town of Penang. She was the daughter of Felix Baptist and Ann Jeremiah. On April 19, 1847, she was married at the same church to Richard Gaudoin. On August 25, 1848, a daughter was born of that marriage, who was baptized at the same church on September 3, 1848. The next two events established concerning Petronella are the birth of her son Khoo Hun Tee in 1854, and the birth of an illegitimate daughter on August 26, 1856. This daughter was baptized at the Catholic Church of the Immaculate Conception, Pulo Tikus, Penang, on September 15, 1856; and on March 13, 1857, Khoo Hun Tee was baptized at the same church, being described in the register as "Edward Baptist, illegitimate son of Petronella Baptist about 4 years old." It is not known who was the father of the illegitimate daughter; but it is common ground that the settlor was the father of Khoo Hun Tee. On February 5, 1861, Petronella was married at the same church to one Henry Cornelius. In the marriage register she is described as "Petronella Baptist, adult, legitimate daughter of Felix and Anna Baptist, and widow of Richard Gaudoin." Nothing is known as to where or when Richard Gaudoin died. Petronella died in 1886. There is no dispute as to any of the above facts.

The registrar's certificate of Khoo Hun Tee's legitimacy was based upon alternative findings of facts. He found that Petronella was a t'sip, or lawful secondary wife, of the settlor; and that even if she were not, yet Khoo Hun Tee had been legitimated by subsequent recognition.

Before considering the correctness of these findings it is necessary to state that in their Lordships' view the inquiry is to be answered by ascertaining whether Khoo Hun Tee was the legitimate son of the settlor in accordance with the law operative in the Straits Settlements, the test being whether he would be entitled to enjoy the civil rights which according to that law would be enjoyed by a son of the settlor.

If Petronella had in fact been a t'sip or secondary wife of the settlor there would be no room for doubt upon the question whether in accordance with the law operative in the Straits Settlements Khoo Hun Tee was legitimate. He would be legitimate being a son by a lawful wife, for polygamy amongst the Chinese is recognized by the Courts of the Colony.

Their Lordships, however, agree with the views expressed by Sproule J. that the evidence does not justify any finding that Petronella was a t'sip or lawful secondary wife of the settlor. Even if (contrary to the usual presumption) it were assumed that at the time when Khoo Hun Tee was conceived Richard Gaudoin was in fact dead, so that Petronella was soluta or free to marry, nevertheless the evidence establishes nothing that is inconsistent but much that is only consistent with the view that the association between Petronella and the settlor was merely of a temporary or casual character.

There are many facts in the case which render it most improbable that Petronella occupied the status of a t'sip or that her association with the settlor was intended to be of a permanent nature. She was a Catholic, who never definitely abandoned her religion. So far as the evidence goes no association with the settlor is proved before the date when Khoo Hun Tee was conceived—namely, somewhere about May, 1853. Her illegitimate daughter was born in August, 1856, and baptized within three weeks of birth. Her association with the settlor must have ceased by that time, and in all probability had ceased before the daughter was conceived, i.e., before November, 1855. The period of association between these two persons may, upon the evidence, have only lasted between May, 1853, and November, 1855. But even taking the outside limits of its possible duration—namely, between 1848 (when the legitimate daughter was born) and 1861 (when Petronella married Cornelius), their Lordships are of opinion that there is no evidence that the parties intended their union to be permanent in its nature. Moreover, the fact that the association between the parties was in fact severed affords strong evidence that Petronella was never a t'sip, for according to the evidence of Mr. Beatty (the only expert on Chinese custom who was called) a t'sip cannot be put away who has borne a son and "in the Straits Settlements there is no divorce provided for by the laws for the Chinese."

In the opinion of their Lordships it is impossible to find upon the evidence that Petronella was a t'sip or lawful secondary wife of the settlor.

Unless Khoo Hun Tee was legitimate upon some other ground the appeal must fail.

An alternative argument was presented on behalf of the appellant, based upon the registrar's finding that Khoo Hun Tee had been legitimated by subsequent recognition.

It is unnecessary to refer in detail to the evidence adduced on this head, because the respondent concedes (and in their Lordships' opinion rightly concedes) that the evidence of recognition would be sufficient to establish legitimation by recognition according to Chinese custom.

The crucial question then arises—namely, was he a legitimate son of the settlor according to the law operative in the Straits Settlements ? In other words, is the Chinese custom of legitimation by recognition part of the law operative in the Colony ?

That the law operative in the Straits Settlements recognizes as legitimate the children of a t'sip is clear from the decision of this Board when the present litigation came under its consideration in 1926. In delivering the judgment of the Board Lord Phillimore uses the following language in considering the status of a t'sip and her children : "It is said that for a long time such a union was considered as carrying with it no legal consequences, and the children were deemed frankly illegitimate throughout the Straits Settlements. But in the *Six Widows'* case (1) the Supreme Court of the Straits Settlements decided in the year 1908 that a 't'sip' or secondary wife is entitled to take a widow's share in the estate of her deceased husband, she being equivalent for this purpose with a 't'sai' or principal wife ; and following this doctrine to its logical conclusion, the same Court held that the children of a 't'sip' were entitled to inherit equally with the children of a 't'sai.' In the later case the same Court decided that no form of marriage ceremony was necessary for creating the position of a 't'sip,' and an appeal having been taken to His Majesty in Council, this Board advised that the judgment should be affirmed, thereby also inferentially affirming the previous judgment. This case is reported as *Cheang Thye Phin* v. *Tan Ah Loy*." (2)

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(1) 12 S. S. L. R. 120.

(2) [1920] A. C. 369.

On the other hand, daughters are admitted to share on an intestacy, in other words, the Chinese custom which excludes females from sharing in the estate of a Chinese intestate does not apply in the Straits Settlements: *Lee Joo Neo* v. *Lee Eng Swee* (1); or to state the position in other language, the English law of succession is not modified in its application to Chinese residents in the Colony by incorporating the Chinese custom of excluding females.

Furthermore, by the law operative in the Colony the adopted son of a Chinese intestate has no right to share in the intestate's estate. This is stated by Sproule J. to have been settled law ever since the judgment (in 1858) of Sir Peter Maxwell in *Reg.* v. *Willans.* (2) In 1877 Sir Theodore Ford adopted that view after reviewing the earlier decisions: see *Khoo Tiang Bee* v. *Tan Beng Gwat.* (3)

The case of a natural son alleged to have been legitimated by subsequent recognition under Chinese custom does not appear to have arisen for consideration until the present case.

Sproule J. (and Stevens J. in the Appellate Court) held that the Chinese custom of legitimation of a natural son by subsequent recognition was not part of the law operative in the Colony. Their Lordships agree with that view.

The modifications of the law of England which obtain in the Colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified. That was the view expressed by Sir Peter Maxwell C.J. in *Choa Choon Neo* v. *Spottiswoode* (4); and this Board, in *Yeap Cheah Neo* v. *Ong Cheng Neo* (5), stated that in Sir Peter Maxwell's judgment "the rules of English law, and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the Colony are correctly stated."

From the above mentioned necessity arises the recognition by the Courts of the Colony of polygamous marriages among

(1) 4 Kyshe, 325.
(2) 3 Kyshe, 16.
(3) 1 Kyshe, 413.
(4) 1 Kyshe, 216, 221.
(5) L. R. 6 P. C. 381, 396.

the Chinese, and, as a logical consequence, the recognition of the legitimacy of the offspring (whether male or female) of such marriages.

Their Lordships, however, are unable to find any grounds which would justify such a modification of English law as to treat an illegitimate natural son as legitimated by the mere fact of subsequent recognition. Legitimation of a child, whose parents are not husband and wife, is unknown and repugnant to the common law of England, and no hardship (much less injustice or oppression) need result from a refusal to admit a modification in this respect of the English law in its application to Chinese.

Their Lordships are of opinion accordingly that the appellant's alternative contention also fails.

There remains for consideration an additional argument urged on his behalf. It was said that the fact of recognition, established as it was by the evidence, raised a presumption in favour of the view that the mother of Khoo Hun Tee was a t'sip, that such presumption had not been rebutted, and that Khoo Hun Tee should therefore be held to be legitimate.

In their Lordships' opinion this argument is destroyed by the evidence of Mr. Beatty, from which it would appear that, according to Chinese custom, "a mistress may not be recognized and yet her son may"—or, as he phrases it in another passage, "legitimisation of the son does not necessarily imply legitimisation of the mother." In the face of this statement as to Chinese custom the mere fact of recognition of a person as a son cannot, in their Lordships' view, raise any presumption of marriage between the parents.

For these reasons their Lordships will humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Solicitors for appellant: *Herbert Z. Deane & Co.*
Solicitors for respondent: *Shelton & Co.*

[PRIVY COUNCIL.]

J. C.*
1930
March 4.

ATTORNEY - GENERAL FOR BRITISH COLUMBIA . . . . APPELLANT ;

AND

McDONALD MURPHY LUMBER COMPANY, LIMITED . . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Canada (*British Columbia*)—*Legislative Power*—*Taxation*—*Export Tax*—*Customs and Excise*—*Indirect Taxation*—*Timber*—*Forest Act* (*Rev. Stat. of B. C.*, 1924, *c.* 93), *s.* 58—*British North America Act*, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92, *head* 2; *s.* 122.

Sect. 58 of the Forest Act, 1924, of British Columbia, imposed a tax upon all timber cut within the Province, except that upon which a royalty was payable, but provided that in the case of timber used or manufactured in the Province there should be a rebate of nearly the whole tax. The Act prohibited under penalty the export of any timber without a certificate that the tax due in respect of it had been paid :—

Held, that the tax was invalid because it was an export tax, and so fell within the category of duties of customs and excise, which the Dominion legislature had exclusive power to impose by s. 122 of the British North America Act, 1867; also because it was indirect taxation, and therefore not within the legislative power of the Province under s. 92, head 2, of that Act.

A tax levied on a commercial commodity upon the occasion of its exportation in pursuance of trading transactions cannot be described as a tax whose incidence, by its nature, is such that it is finally borne by the first payer and is not susceptible of being passed on.

Judgment of the Supreme Court of British Columbia affirmed.

APPEAL (No. 115 of 1929) by special leave from a judgment of the Supreme Court of British Columbia, dated May 23, 1929.

The respondents brought an action in the Supreme Court against the appellant, claiming (inter alia) a declaration that s. 58 of the Forest Act, 1924, of British Columbia, which imposes a tax upon timber cut within the Province, and ss. 62 and 127 of that Act, so far as they implemented s. 58, were ultra vires the Provincial legislature.

* *Present* : LORD BLANESBURGH, LORD MERRIVALE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

The provisions of the sections in question and the material facts appear from the judgment of the Judicial Committee.

The action was tried by Morrison C.J., who held that the taxation, owing to its nature and the general tendency to pass it on to a purchaser, was indirect, and therefore not within the Provincial legislative power under s. 92, head 2, of the British North America Act, 1867. He accordingly made the declaration prayed.

Special leave to appeal was granted by the Judicial Committee.

1930. Feb. 6, 7, 10. *Hon. Geoffrey Lawrence K.C.* and *Wilfred Barton* for the appellant. The tax imposed by s. 58 of the Forest Act is a tax upon property—namely, cut timber—and is therefore direct taxation within s. 92, head 2, of the British North America Act, 1867. The decision of the Board in *City of Halifax* v. *Fairbanks' Estate* (1), that a tax upon property is a direct tax, and that a consideration of its ultimate incidence was inadmissible, is not confined to immovable property. Duties of customs and excise are by their nature indirect taxes, because bonded warehouses provide machinery for their being passed on. The Forest Act contains no machinery for that purpose. The evidence showed that the tax made no difference in the price of the timber in the State of Washington. It was a tax imposed upon the owner, with provisions enabling him to defer payment until he realized the value of the timber. *A.-G. for British Columbia* v. *Canadian Pacific Ry. Co.* (2), which was relied on below, is distinguishable, as there the tax was in effect upon dealings with a commodity in the Province. The terms of s. 121 of the British North America Act, 1867, show that that and the following sections deal with taxes on importation into a Province. The timber tax should be considered as part of the Provincial scheme of taxation upon land according to its produce. That appears, as timber grown upon land granted before 1887 being subject to a royalty was not taxed by s. 58. [Reference was made also to *A.-G. for*

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(1) [1928] A. C. 117.

(2) [1927] A. C. 934.

Quebec v. *Queen Insurance Co.* (1); *Bank of Toronto* v. *Lambe* (2); *Brewers' and Maltsters' Association for Ontario* v. *A.-G. for Ontario* (3); *Smith* v. *Vermilion Hills Rural Council* (4); *In re Validity of Manitoba Act* (5); *A.-G. for Manitoba* v. *A.-G. for Canada.* (6)]

E. P. Davis K.C. for the respondents. The object of the timber tax was not to raise revenue but to prevent the export of timber. It was an export tax. That is clear, as the Act subjects unexported timber to a light tax, which moreover has not been collected since 1914. A Provincial legislature cannot do indirectly what it has not power to do directly: *Madden* v. *Nelson and Fort Sheppard Ry.* (7) The Dominion legislature has exclusive power under s. 122 of the Act of 1867 as to duties of custom and excise. Custom duties by accepted definitions are duties imposed upon commodities exported or imported: Halsbury's Laws of England, vol. xxiv., p. 587. The legislative power of the Dominion in any matter is exclusive: *A.-G. for Canada* v. *A.-G. for Ontario* (8); *Union Colliery Co. of British Columbia* v. *Bryden* (9); *Toronto Electric Commissioners* v. *Snider.* (10) Although the Dominion in the exercise of its legislative powers may in certain circumstances invade the field of Provincial legislative power, the converse is not the case: *A.-G. for Ontario* v. *A.-G. for the Dominion* (11); *In re Alberta Ry. Act.* (12) Levying a customs duty upon a commodity is not a taxation of property; it falls within the Dominion powers under s. 91, head 2, as to the regulation of trade and commerce: *A.-G. of British Columbia* v. *A.-G. of Canada.* (13) The Dominion legislature has dealt with the levying of custom duties upon timber and other commodities in R. S. Can., 1927, c. 63, originally passed in 1897. Further, the tax now in question was not direct taxation within s. 91, head 2, of the Act of 1867. From its nature there would be

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(1) (1878) 3 App. Cas. 1090.
(2) (1887) 12 App. Cas. 575.
(3) [1897] A. C. 231.
(4) [1916] 2 A. C. 569.
(5) [1924] S. C. R. 317, 322.
(6) [1925] A. C. 561.
(7) [1899] A. C. 626.
(8) [1898] A. C. 700, 714.
(9) [1899] A. C. 580, 588.
(10) [1925] A. C. 396, 406.
(11) [1926] A. C. 348, 359, 360.
(12) (1913) 48 Can. S. C. R. 9, 22, 29.
(13) (1922) 64 Can. S. C. R. 377, 382, 384; [1924] A. C. 22.

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a tendency to pass it on to a purchaser; that being so, it is not necessary to show that it actually was passed on: *Rex* v. *Caledonian Collieries.* (1) In that case, as in this, it was contended that the tax was one upon property. [Reference was made also to *In re Hudson's Bay Co.* v. *Heffernan* (2) and *Security Export Co.* v. *Hetherington.* (3)]

Hon. Geoffrey Lawrence K.C. in reply. A Provincial legislature has power under s. 92, head 13 (property and civil rights), to protect and conserve the natural products of the Province. If, and so far as, the timber tax is not within s. 92, head 2, it can be justified under s. 92, head 13. The tax was not within the legislative power of the Dominion as to the regulation of trade and commerce, because that head does not authorize the Dominion to legislate as to a particular trade in a Province: *Citizens Insurance Co. of Canada* v. *Parsons* (4); *Toronto Electric Commissioners* v. *Snider.* (5)

E. P. Davis K.C. referred on that point to *A.-G. for Canada* v. *A.-G. for Alberta.* (6)

March 4. The judgment of their Lordships was delivered by

Lord Macmillan. The controversy in this appeal relates to the validity of an enactment of the legislature of the Province of British Columbia imposing a tax on timber cut within the Province.

The tax was originally imposed in 1903 in substantially its present form by a Provincial statute of that year, and was subsequently re-enacted with unimportant alterations until in s. 58 of the Forest Act, being c. 93 of the revised statutes of British Columbia, 1924, it assumed the form in which its legality is now for the first time challenged.

The section reads as follows: " 58. There shall be due and payable to His Majesty a tax upon all timber cut within the Province, save and except that upon which a royalty is reserved by this Act or the 'Timber Royalty Act,' or that upon which any royalty or tax is payable to the Government of the Dominion, which tax shall be in accordance with the following Schedules : " The first schedule deals with " timber suitable for the manufacture of lumber and shingles," which it classifies into three grades, to be taxed respectively at $2, $1.50 and $1 per 1000 feet, board measure, " provided that a rebate of all the tax over one cent. per thousand feet board measure, shall be allowed when the timber upon which it is due or payable is manufactured or used in the Province." Schedule No. 2 deals with piles, poles and crib timber, schedule No. 3 with railway-ties, mining props and lagging, pulp-wood and cordwood, and schedule No. 4 with shingle or other bolts of cedar, fir or spruce, taxes of varying amount being assigned to the different categories. To each of these other schedules, as to the first, is appended a proviso remitting, by way of rebate, all the tax over one cent when the timber is used in the Province.

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(1) [1928] A. C. 358.
(2) [1917] 3 W. W. Rep. 167.
(3) [1923] S. C. R. 539; [1924] A. C. 988.
(4) (1881) 7 App. Cas. 96, 112, 113.
(5) [1925] A. C. 396, 409.
(6) [1916] 1 A. C. 588, 597.

Sect. 62 of the statute prohibits, under a penalty, the export or removal from the Province of any timber in respect of which any tax is payable to His Majesty in right of the Province unless a permit is obtained from an officer of the Forest Board certifying that all taxes so payable in respect thereof have been paid and confers on the Minister of Lands drastic powers for the enforcement of the Act.

Sect. 127 requires every owner of granted lands and every holder of a timber lease or licence on lands whereon any timber is cut in respect of which any tax is payable, and every person dealing in any timber cut from any such lands and every person operating a mill or other industry which cuts or uses timber upon which any tax is payable, to keep correct books of account of all timber cut for or received by him and to render monthly statements to the district forester, " and the owner, lessee or licensee or person dealing in the timber or operating the mill or other industry as aforesaid shall pay monthly all such sums of money as are shown to be due, to the Minister."

The respondent company are engaged in the business of logging, and sell both locally and for export timber which they cut upon lands granted to them or their predecessors. Having entered into a contract to sell a consignment of their logs to a purchaser in the State of Washington, U.S.A., they applied to the customs officials of the Dominion government for clearance, which was refused on the ground that they did not hold an export permit from the Provincial government. The officers of the forest branch of the Provincial government declined to grant an export permit except on payment of the tax now in question. Thereupon the respondent company instituted the present proceedings against the Attorney-General for British Columbia claiming a declaration that they were under no obligation to pay the tax demanded, and that the relative provisions of the statue were ultra vires of the Provincial legislature.

The case was heard in the Supreme Court of British Columbia by Morrison C.J. sitting alone, who, after hearing evidence, gave judgment declaring s. 58 of the Forest Act and ss. 62 and 127 " in so far as they purport to implement any tax levied by the said s. 58," to be ultra vires of the Provincial legislature. From that judgment the present appeal is taken.

The validity of the tax was maintained by the appellant on the ground that it was competently imposed by the Provincial legislature as being " direct taxation within the Province in order to the raising of a revenue for Provincial purposes," which is the second class of subjects upon which Provincial legislatures have by s. 92 of the British North America Act, 1867, exclusive power to make laws.

The respondent company, on the other hand, impugned the tax mainly on two grounds—namely: (1.) that it was an indirect tax, and, therefore, not within the competence of the Provincial legislature; and (2.) that it violated ss. 121, 122, 123 and 124 of the Act of 1867. Sect. 121 provides for the free admission into each of the other Provinces of all articles of the growth, produce or manufacture of any one of the Provinces. Sect. 122 enacts that "the customs and excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada." Sect. 123 deals with customs duties in relation to exportation and importation as between two Provinces. Sect. 124 saves the right of New Brunswick to levy but not to increase certain lumber dues in operation at the Union, "but the lumber of any of the Provinces other than New Brunswick shall not be subjected to such dues."

Their Lordships have on many occasions been called upon to determine questions relating to the constitutional validity of fiscal legislation under the British North America Act and have laid down the principle that in every case the first requisite is "to ascertain the real nature of the tax": *Rex* v. *Caledonian Collieries.* (1) Now, in the present case, the real nature of the tax in question is transparently obvious. While the statute sets out to impose a tax on all timber cut within the Province it proceeds in the relative schedules to reduce the tax by rebate to an illusory amount in the case of timber used in the Province, leaving it to operate to its full effect only on timber exported. The best evidence that the tax was intended to be to all intents and purposes an export tax is afforded by the fact that since 1914 the minute rebated tax on timber used within the Province has not been collected. Indeed, the tax has come to be known as "the timber tax on export," and is so described in the final report of the Royal Commission of inquiry on Timber and Forestry, 1909–10, extracts from which are among the exhibits in the case. The economic effect and, presumably, the object of the tax is to encourage the utilization within the Province of its home-grown timber and to discourage its exportation. The success of the tax, if this be its object, will thus be measured inversely by the revenue which it yields, which is not the normal characteristic of a tax imposed "in order to the raising of a revenue for Provincial purposes."

Once it is ascertained that the tax is in its real nature an export tax, as their Lordships are satisfied that it is, the task of justifying its imposition by the Provincial

(1) [1928] A. C. 358, 362.

legislature becomes one of great difficulty. The appellant admitted that the imposition of customs and excise duties is a matter within the exclusive competence cf the Dominion parliament, as, indeed, plainly appears from s. 122 of the British North America Act. The reason for this is, no doubt, that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied, which is perhaps just another way of saying that they are indirect taxes. If then an export tax falls within the category of duties of customs and excise there is an end of the question. Their Lordships are of opinion that according to the accepted terminology and practice of fiscal legislation and administration export duties are ordinarily classed as duties of customs and excise. In Wharton's Law Lexicon "Customs" are defined as "duties charged upon commodities on their importation into or exportation out of a country," and a similar definition is given in Murray's New English Dictionary. An early example of this usage is to be found in Comyn's Digest, 5th ed., 1822, p. 468, where, under the heading of "Customs of tonnage and poundage," there is mentioned poundage "on all goods carried out of the King's dominions," with a citation of 12 Car. 2, c. 4, while a modern instance is provided by the Finance Act, 1901, in which s. 3, imposing an export duty on coal, is included in Part I. of the Act, headed "Customs and Excise."

Mr. Lawrence, however, contended that although the tax might accurately be described as an export duty, this did not necessarily negative its being a direct tax within the meaning of the Act. Without reviewing afresh the niceties of discrimination between direct and indirect taxation it is enough to point out that an export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. Whether the tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between them. It may be borne by the one or by the other. It was said in the present case that the conditions of the competitive market in the United States compelled the exporter of timber from British Columbia to that country to bear the whole burden of the tax himself. That, however, is a matter of the exigencies of a particular market, and is really irrelevant in determining the inherent character of the tax. While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, a tax which, like the tax here in question, is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the first payer, and is not susceptible of being passed on. On the contrary, the existence of an export tax is invariably an element in the fixing of prices, and the question whether it is to be borne by seller or purchaser in whole or in part is determined by the bargain made. The present tax thus exhibits the leading characteristic of an indirect tax as defined by authoritative decisions.

Their Lordships are accordingly of opinion, without entering upon other topics which were discussed at the hearing, that the timber tax in question is an export tax falling within the category of duties of customs and excise, and as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the Provincial legislature.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Gard, Lyell & Co.*

Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

J. C.*
1930
March 10.

BENJAMIN KNOWLES . . . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE CHIEF COMMISSIONER'S COURT OF ASHANTI (EASTERN PROVINCE).

Ashanti—Trial for Murder without a Jury—Statutory Power so to try in certain Circumstances—Presumption that Circumstances existed—Privy Council Practice—Absence of substance of fair Trial—Conviction set aside—Ashanti Administration Ordinance (*No. I. of* 1902), *s.* 9.

The appellant was convicted of the murder of his wife, and sentenced to death upon a trial in Ashanti without a jury. By s. 9 of the Ashanti Administration Ordinance, 1902, " so far as it is practicable and local circumstances permit " the procedure, civil and criminal, in the Ashanti Court was to be the same as in the Supreme Court of the Gold Coast Colony; in that Court it was imperative by Ordinance that a trial for murder should be with a jury. The trial judge had not stated that a trial with a jury was not practicable or not permitted by local circumstances. It appeared on the appeal that there never had been trial by jury in Ashanti.

The death of appellant's wife resulted from a wound inflicted by a shot from a revolver while she and the appellant were together alone in a room. By a dying declaration she had stated that the revolver had been fired accidentally by herself in a manner which she described. The appellant in his evidence also attributed the wound to an accident by her. There was much circumstantial evidence:—

Held, that it should be presumed that a trial with a jury was not practicable, or was not permitted by local circumstances, and accordingly that the appeal failed so far as it was based upon want of jurisdiction; but that the appeal should be allowed upon the ground that the appellant had not the substance of fair trial, and had suffered substantial and grave injustice, in that the trial judge, having come to the conclusion that the revolver had been fired by the appellant, had entirely failed to consider whether the evidence justified a conviction for murder as opposed to manslaughter, and the Board was clearly of opinion that it did not.

APPEAL (No. 54 of 1928) by special leave from a judgment of the Chief Commissioner's Court of Ashanti (Eastern Province), delivered on November 23, 1928, convicting the appellant of murder and sentencing him to death.

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* *Present:* LORD SANKEY L.C., VISCOUNT DUNEDIN, LORD DARLING, LORD ATKIN, and LORD THANKERTON.

The appellant was tried in the Chief Commissioner's Court of Ashanti by the acting Circuit Judge sitting at Kumasi without a jury, upon a charge under s. 224 of the Criminal Code of the Gold Coast Colony (applied to Ashanti by an Ashanti Ordinance of 1925) of having murdered his wife. The trial occupied from November 13 to 21, 1928, and on November 23 the Circuit Judge delivered judgment convicting the appellant and sentencing him to death.

On January 29, 1929, the Governor of the Gold Coast Colony in the exercise of powers vested in him granted the appellant His Majesty's pardon on condition that he be imprisoned for life.

On May 7, 1929, the Judicial Committee granted the appellant special leave to appeal from the conviction and sentence.

The terms of ss. 8 to 10 of Ashanti Administration Ordinance I. of 1902, as amended, relating to the law and procedure in the Ashanti Court, and the material facts appearing upon the evidence, are stated in the judgment of the Judicial Committee.

The procedure in criminal cases in the Supreme Court of the Gold Coast Colony, which by s. 9 of the above mentioned Ashanti Ordinance is made applicable in Ashanti "so far as is practicable and local circumstances permit" is laid down in the Criminal Procedure Ordinance (Laws of that Colony, 1920, c. 13, c. 31 in 1928 ed.). Sects. 117 and 118 of that Ordinance provide:

"117. In cases tried with a jury the trial shall be with a jury of seven men who may be common or special jurors.

118. Trials in all cases punishable by death shall be heard before a jury of seven special jurors, unless the said number of special jurors are not comprised in the jurors' list for the place where the trial is had, or not obtained when summoned, when the trial may be had with any less number of special jurors, the remainder of the jury being made up of common jurors." (1)

(1) In the Laws of the Gold Coast Colony, 1928, the numbers of the sections in both Ordinances referred to above are varied.

Sects. 178 to 198 deal with the qualification of jurors and the preparation of jury lists.

The powers of the acting Circuit Judge were derived from Ashanti Ordinance No. 9 of 1919, ss. 2 and 3.

1929. Nov. 18, 19. *Pritt K.C.* and *Horace Douglas* for the appellant. Having regard to s. 9 of the Ashanti Administration Ordinance, 1902, and s. 118 of the Gold Coast Criminal Procedure Ordinance, 1920, the Court had no jurisdiction to try the appellant without a jury unless it was not practicable, or not permitted by local circumstances, to have a jury. There could be no difficulty in Kumasi in obtaining the small jury required by s. 118. The trial judge has nowhere stated that it was impracticable to do so, or that local circumstances did not permit it. The printed case for the Crown contends that s. 118 did not apply because it is in a part of the Ordinance headed "Trials upon information," and the law of Ashanti makes no provision for informations. But even if that heading can affect the imperative terms of s. 118, the commissioner of police signed the charge, and for that purpose he represented in Ashanti the Attorney-General. If that part of the Ordinance does not apply there was no power in Ashanti to try an indictable offence; nor was there power to take the dying deposition, as the section providing for that is in the same part. The Judicature Ordinance of Ashanti (No. IX. of 1919) contemplates that a trial for murder shall be with a jury, as it provides that a trial for murder shall not take place unless the Circuit Judge "presides over" the Court. Upon the facts (1) the judgment was unsatisfactory in many respects. More particularly in that the trial judge, having come to the conclusion that the facts stated in the dying declaration did not agree with the circumstantial evidence, treated a conviction for murder as the inevitable alternative. If the dying declaration is disregarded the rest of the evidence was wholly insufficient to justify a conviction. The trial judge failed to consider whether the evidence justified a conviction for murder, although the Criminal Code lays down circumstances in which homicide may amount to manslaughter only; those circumstances include loss of self-control due to extreme provocation. The appellant suffered substantial and grave injustice within the meaning of *In re Dillet* (1); he had not "the substance of fair trial," and in *Ibrahim* v. *The King* (2) that was stated as a ground upon which a conviction could be set aside. [Reference was made also to *Vaithinatha Pillai* v. *The King-Emperor.* (3)]

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(1) The arguments upon the facts were heard after those upon the question of jurisdiction were concluded.

Sir William Jowitt A.-G. and *C. H. Pearson* for the Crown. Under the maxim "Omnia praesumuntur," etc., it is to be presumed that a competent Court has properly exercised its jurisdiction, and that rule applies in a criminal case: *Reg.* v. *Brenan* (4); *Morris* v. *Ogden* (5); Broom's Legal Maxims, 11th ed., p. 740. This case should be considered therefore as if the trial judge had stated in his judgment that it was not practicable to have a jury, or that local circumstances did not permit it. There is no provision in Ashanti for preparing jury lists or summoning jurymen; trial by jury has never been introduced into Ashanti. Trial by information, which is dealt with in that part of the Criminal Procedure Ordinance of the Gold Coast which contains s. 118, does not form part of the Ashanti system; there is no attorney-general and no provision for informations. With regard to the facts, while it is not desired that the Board should limit its jurisdiction, attention is drawn to *In re Dillet* (1) and *Arnold* v. *The King-Emperor* (6) as to the practice of the Board in criminal cases. It is submitted that the evidence was sufficient to justify the conviction.

Pritt K.C. in reply. The maxim, and the cases referred to thereon, do not apply. First, because it is apparent that the trial judge dispensed with a jury not because it was impracticable to have one, but because in his view it was not necessary under the procedure in Ashanti. Secondly,

(1) (1887) 12 App. Cas. 459, 467.
(2) [1914] A. C. 599, 615.
(3) (1913) L. R. 40 I. A. 193.
(4) (1847) 16 L. J. (Q. B.) 289, 292.
(5) (1869) L. R. 4 C. P. 687, 703, 704.
(6) (1914) L. R. 41 I. A. 149.

because the Court as constituted was not a competent Court. By s. 8 of the Ordinance of 1902 the Court was to be guided by the law in force in the Gold Coast Colony, and by s. 14 of the Supreme Court Ordinance that included the common law of England. Further, even if it was not practicable to have a jury, the Court was not authorized to try the appellant without one. In order to comply with ss. 8 and 9 of the Ordinance of 1902, the proper course was to refer the case to the Supreme Court of the Gold Coast for trial; there was express power to do so by s. 17 of the Ordinance of 1902.

At the conclusion of the argument their Lordships stated that they would humbly advise His Majesty that the appeal should be allowed, and that their reasons would be stated later.

1930. March 10. The report of their Lordships was delivered by

VISCOUNT DUNEDIN. This appeal, for which special leave was granted by His Majesty in Council, is against a conviction of the appellant for the murder of his wife, Mrs. Knowles, by the acting Circuit Judge of Ashanti on November 23, 1928. The case was tried by the judge without a jury and the appellant was not allowed the assistance of either solicitor or counsel. The grounds of appeal are first, no jurisdiction, and second, that there was no evidence on which a conviction of murder could be maintained.

The Court of Ashanti by which the appellant was tried was established by the Ashanti Administration Ordinance No. 1 of 1902. The sections of the Ordinance, as amended by subsequent ordinances, which bear on the method of trial in criminal cases are the following:—

Sect. 8: "Where not otherwise provided by some other statute, ordinance, or other law for the time being in force in Ashanti, the Court shall in causes and matters brought or arising before it be guided by the law in force in the Gold Coast Colony as set forth in ss. 14–19 of the Supreme Court Ordinance of the said Colony."

Sect. 9: "So far as it is practicable and local circumstances permit, the procedure in the Court, civil and criminal, shall be the same as the procedure in the Supreme Court of the Gold Coast Colony."

Sect. 10: "In no cause or matter, civil or criminal, shall the employment of a barrister or solicitor be allowed."

It is unnecessary to quote the various sections of the Acts which regulate procedure in the Gold Coast, as it is clear that if the trial had been in the Gold Coast it would have been imperative to have a jury for a capital case and the prisoner would, if he chose, have had the assistance of counsel and solicitor.

The appellant therefore contends that a jury for a capital case was a sine qua non, and that a conviction by a judge sitting alone cannot stand.

The Attorney-General stated, and it was not denied by the appellant, that as a matter of fact there never has been hitherto trial by jury in Ashanti.

Now the direction that in Ashanti the criminal procedure of the Gold Coast shall be the guide is not absolute, but is qualified by the provisions of s. 9. If jury trial is not practicable, or not permitted by local circumstances, then the direction does not apply. Practicability and the state of local circumstances are questions which can only be determined in Ashanti on the spot. It is impossible for their Lordships of this Board to form a conclusion on such matters, and it is not for them to turn themselves into a local tribunal. They are of opinion that this is a matter to which the maxim "Omnia praesumuntur rite et solemniter acta" clearly applies, and they are therefore unable to sanction this ground of appeal.

Before dealing with the question of the evidence their Lordships think it necessary emphatically to repeat what has been said on many occasions, that they do not sit as a Court of Criminal Appeal. To allow criminal proceedings to be reviewed, to use the words of Lord Watson in *Dillet's* case (1), there must have been "substantial and grave injustice

(1) 12 App. Cas. 459, 467.

. . . . done." In the present case if it had turned out that it was against the law for a judge to try a capital case without a jury, that would have been substantial injustice, for it would have been conviction without jurisdiction, and it was on that ground that leave of appeal was manifestly granted. But the case having been brought up it is incumbent on their Lordships to examine the judgment as given. Even in this somewhat exceptional case, however, their Lordships are still not sitting as an ordinary criminal court of appeal in which case they would be entitled to consider what would have been their own verdict. Though the criterion is hardly as strict as it would have been on an application for leave based on the simple ground that the evidence did not support the verdict, yet they must be satisfied that there is something which, to use the words of Lord Sumner in *Ibrahim* v. *The King* (1) " deprives the accused of the substance of fair trial."

Now the facts of the case as proved are simple enough. The appellant and his wife were alone in their bedroom after luncheon. There had been guests at luncheon, who had gone away shortly after 2 P.M. without anything noticeable having happened. Their native servants heard loud voices suggestive of quarrelling. The appellant and his wife it was proved lived generally on good and, indeed, affectionate terms, but had occasional quarrels which were greatly induced by the fact that both the appellant and his wife were addicted to the taking of too much liquor, and the appellant drugs, and were often in a drunken or semi-drunken and dazed condition.

The evidence as to the time is confused and contradictory, but somewhere between 4 and 5 P.M. the native servants heard a shot and a cry. They were frightened, and one of them ran off to the district commissioner, who had been one of the guests at the luncheon and said what he had heard. The district commissioner took his car and went off to the house of the accused, whom he saw, and asked if there had been an accident. The accused said it was all right. The district commissioner then went away. The native servant went back again later and two hours later the district commissioner

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(1) [1914] A. C. 599, 615.

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wrote a note saying the native servants were very excited, and asking if he could be of any service. To this letter he got no reply. About the same time the native servant was called into the room and told to clean up a pool of blood. The accused said to his wife he would like to send her to the hospital. He then said he would go himself, and went. When he was gone the cook, by desire of Mrs. Knowles, lifted a revolver which was by the bed and put it into a box, locked it, and gave her the key. While clearing up the blood he picked up something which he did not recognize, but which was a revolver bullet.

That evening the accused got a sleeping draught containing morphia from the dispensary of the hospital. Next evening he got a repetition of the medicine and a hypodermic syringe with two ampoules of morphia. About 3 o'clock that day Dr. Gush, who lived at Kumasi, heard that something had happened and in consequence drove down to Bekwai, where the accused lived. He found the accused in a somewhat dazed condition and bearing signs of the results of alcohol and the drugs above referred to. The accused volunteered the information that there had been "a domestic fracas," and showed him his left leg covered with bruises which he said had been inflicted by his wife with an Indian club. He also said that she had been nagging him and he had said if she didn't stop he would put a bullet in her. Dr. Gush asked to see Mrs. Knowles, and heard her say she would like to see him. He then went into the bedroom with the accused and examined the wounds, which he found had been treated with iodine by the accused—a proper, though in the circumstances scarcely a sufficient, treatment. The wound was such a wound as would be inflicted by a revolver bullet. It was in a peculiar direction. The bullet entered the left buttock and proceeded in an upward direction, and making its exit at the lower side of the abdomen on the right side, having, as was afterwards disclosed at a post-mortem, pierced the intestine, the bladder and the uterus. It was not bleeding directly when Dr. Gush saw it, but there was some blood coming from the vagina.

He asked Mrs. Knowles how the accident happened and she said she had been examining her husband's revolver which had been recently cleaned by the police, that she had put the revolver down on a chair, and shortly after sat upon it, that she tried to remove it from underneath her, but the openwork sleeve of her dress caught in the trigger and the revolver went off.

Dr. Gush said she must go to the hospital but had better have a bath first. He found the accused at the fire quite dazed. He went to fetch his car; on coming back he got the revolver from Mrs. Knowles, and found in it five cartridges and one empty shell. He noticed a hole in the mosquito net which covered the two beds.

Mrs. Knowles died the next day, but before she died she made a dying declaration. This was to the same effect as to what she had said to Dr. Gush with two small differences. She mentioned that the revolver had been cleaned, but did not say " by the police," and she said that before it happened the boy had come in with afternoon tea.

Other matters to be mentioned are that the mosquito net had several holes in it: that the accused said that on one occasion his wife had put a bullet past him while he was in bed; that another bullet was found by the police and certain marks on the furniture. Further, on October 22 the acting and assistant commissioner of police went to Bekwai and found the accused in bed lying in bloodstained sheets and having on blood-stained pyjamas. He was weak and ill, but they considered him rational. They told him that they were going to detain him on a charge of causing grievous bodily harm and that a dying declaration was to be taken from his wife. He then made several remarks, namely: "I think she will roll up" (i.e., die). " This is a bad business, I may go to prison." " If she rolls up I am afraid I am for it." He went with them to Kumasi, and in the assistant commissioner's bungalow, while the acting commissioner went for a warrant, he said, " I don't care what happens to me, I am worried about my wife," and then, " If my wife rolls up it means a murder case," and again, " If my wife rolls up I will be hung by the neck until I am dead."

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Their Lordships must now examine the judgment. In the judgment of the circuit judge is to be found what to a jury would have been the summing up, and then the verdict. Now the judge examines at great length the possibilities as to which bullet of the two bullets found, one of which had made dents in the furniture, was the bullet which caused the wound. Upon this question he comes to no certain conclusion, being oppressed by the difficulties as to either theory. In their Lordships' view this inquiry is quite by the mark. It is quite certain that the deceased was killed by a revolver bullet, and there being no certain evidence as to the position of the parties at the time, no conclusions can be drawn from the possible indicia as to the flight of the bullet. The judge next takes up the story of the deceased as given in the evidence of Dr. Gush, and as given in the wife's dying declaration, and along with it the story as given by the prisoner himself when he gave evidence at the time. That story, abbreviated, is as follows: That he had had a quarrel with his wife about nothing, which ended, that he then went to bed to sleep, that he saw his wife come in and start to undress and afterwards went to sleep, that there was a shot fired which woke him, and he heard his wife say she had been shot, that he jumped up and said, "Show me, show me" (this was a remark heard by one of the servants behind the door), that he plugged the wound and put her to bed, and she said, "People will think I have done this purposely," to which he replied she had only to lie quiet and he would take the blame. That he did not trouble about the district commissioner's note, as being a medical man himself he had done what was needful and that he did not want her disturbed. That afternoon he took drink and drugs, and to use his own words, "I had the fixed idea of protecting my wife, and didn't realize until later that my statements were dangerous. I had an idea fixed that I would take any punishment if I could save my wife."

As regards the revolver he said that he usually kept it under his pillow fitted in a holster; that on this occasion he took it out of the holster cocked it and laid it on the book-case. The judge then examines these accounts and finds them unsatisfactory. He is particularly impressed by the statement of Mrs. Knowles as to the servant bringing tea, which was not true, and he saw no reason for the appellant taking out the revolver and cocking it, and points out the discrepancy as to its place, the appellant saying it was on the book-case, while Mrs. Knowles said it was on the chair. He lays stress on the various remarks made by the appellant after the event, which he considers were not made, except as to those on October 22 when in a dazed condition. He thinks it proved that there was a domestic fracas, and considers the remark that he would put a bullet through his wife if she did not stop, very significant. He therefore comes to the conclusion that the wife's story was not true, and then he says, "Taken as above the evidence against the prisoner is overwhelming."

Now the learned judge was entitled to draw his own conclusions as to whether Mrs. Knowles's account was true, and their Lordships, not being, as above stated, an ordinary court of criminal appeal, would not consider themselves entitled to set that aside upon the ground that they would come to a different conclusion on the facts as found. Having come to the conclusion that the story of an accident could not be substantiated, and the position and direction of the wound excluding all idea of deliberate self-infliction, he was driven to the conclusion that the shot was fired by the appellant. That there was criminality in what happened is a necessary result of that conclusion. In a fit of drunken recklessness to fire a shot to silence a nagging woman, which shot the woman, even though the shot was not intended to hit her, is a crime. But the fatal flaw in the judgment is that having set aside Mrs. Knowles's account of the occurrence as accident he at once assumed that the only alternative to accident is murder. There is not the slightest inquiry whether assuming that the shot was fired by the accused, the act amounted to manslaughter and not murder. There is no attempt to face the question whether the standard of proof required to prove murder as against manslaughter has in this case been reached. If the case had been before a jury and the judge had not explained to them the possibility of a verdict of manslaughter,

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but had said if not accident the only alternative is murder, that would have been an erroneous summing-up. That is what is to be found in the judgment. The question as between manslaughter and murder is entirely undealt with, and their Lordships are therefore, as the learned judge failed to consider the question, bound to consider whether the evidence here reached the standard of proof necessary to involve a conviction for murder. They are clearly of opinion that it did not. A conviction for manslaughter might have been a different matter, but that is not before their Lordships. They have therefore humbly advised His Majesty to quash the conviction.

Solicitors for appellant: *Wynne-Baxter & Keeble.*
Solicitor for respondents: *Burchells.*

[PRIVY COUNCIL.]

J. C.*
1930
April 10.

PERFORMING RIGHT SOCIETY, LIMITED . . . . APPELLANTS;

AND

URBAN DISTRICT COUNCIL OF BRAY RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE IRISH FREE STATE.

Irish Free State—Constitution—Appeal to Privy Council—Copyright—Musical Work—Infringement—"Private Profit"—Retrospective Act depriving Appellants of Remedy—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 2, *sub-ss.* 1, 3; *s.* 25, *sub-s.* 1; *s.* 35, *sub-s.* 1—*Irish Free State Constitution Act,* 1922 (13 *Geo.* 5, *sess.* 2, *c.* 1), *Sch. I., arts.* 66, 73; *Sch. II., art.* 2—*Industrial and Commercial Property (Protection) Act,* 1927 (*No.* 16 *of* 1927, *I. F. S.*), *s.* 174, *sub-s.* 1—*Copyright (Preservation) Act,* 1929 (*No.* 25 *of* 1929, *I. F. S.*), *s.* 4.

Under art. 66 of the constitution enacted by the Irish Free State Constitution Act, 1922, construed (as directed by the preamble) with reference to art. 2 of the scheduled treaty, the Judicial Committee has jurisdiction to hear an appeal from the Supreme Court of the Irish Free State to His Majesty in Council by an appellant who has been granted special leave so to appeal.

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* *Present:* LORD SANKEY L.C., LORD BLANESBURGH, LORD HANWORTH M.R., LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

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As by s. 25, sub-s. 1, of the Copyright Act, 1911, that Act extended throughout His Majesty's dominions, except to a self-governing dominion which did not adopt it, and s. 35, sub-s.1, restricted the meaning of "self-governing dominion" to the dominions which are therein specifically named, Ireland not being included, the Act was in force in the Irish Free State when the constitution came into operation, and consequently by art. 73 thereof continued of full force and effect until it was repealed by the Industrial and Commercial Property (Protection) Act, 1927, of the Irish Free State. Sect. 174, sub-s. 1, of that Act which provides that rights acquired under the Act of 1911 before December 6, 1921, shall not be affected by the repeal, preserves rights the inception of which was before that date although they have been assigned after it.

A local authority commits an infringement under s. 2, sub-s. 1, of the Act of 1911, if a band which it has engaged to perform in public plays, without consent, copyrighted musical works which are included in a programme approved by the local authority, and the performance is for the "private profit" of the local authority, within s. 2, sub-s. 3, although any profit resulting will be applied to the relief of ratepayers.

Performing Right Society v. *Bradford Corporation* (1921) Macgillivray's Copyright Cases, 309, approved.

The Judicial Committee, although of opinion that the judgment of the Supreme Court was wrong in holding that the appellants were not entitled to any remedy in respect of an infringement in 1926 of their rights under the Copyright Act, 1911, advised that the judgment should be discharged only so far as it dealt with costs, as the Copyright (Preservation) Act, 1929, passed by the Irish Free State legislature after the grant of special leave to appeal, while enacting that rights under the Act of 1911 were to be deemed always to have subsisted in the Irish Free State, provided by s. 4 that no remedy or relief should be granted in respect of any infringement which had there taken place before the passing of the Act.

APPEAL (No. 27 of 1929) by special leave from a judgment of the Supreme Court of the Irish Free State (July 27, 1928) reversing a judgment of the High Court of Justice (November 15, 1927).

The appellants brought an action on September 16, 1926, against the respondents in the High Court of Justice of the Irish Free State, alleging that by a band performance given on the esplanade of Bray on August 11, 1926, the respondents had infringed their rights under the Copyright Act, 1911, in two musical works. They prayed for an injunction both under s. 2, sub-s. 1, and s. 2, sub-s. 3, of that Act.

Both the musical works in question had been published before December 6, 1921, but the sole performing right in each had been assigned to the appellants after that date.

The defence put all matters in issue, and pleaded further that the Copyright Act, 1911, was not in force in the Irish Free State at the material date.

The material facts appear from the judgment of the Judicial Committee.

The Copyright Act, 1911, provides by s. 25, sub-s. 1, and s. 35, sub-s. 1, as follows :—

Sect. 25, sub-s. 1 : "This Act, except such provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions : Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein. . . . ."

Sect. 35, sub-s. 1 : "In this Act, unless the context otherwise requires,—. . . . 'Self-governing dominion' means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland."

The terms of s. 174, sub-s. 1, of the Industrial and Commercial Property (Protection) Act, 1927 (I. F. S.), are stated in the judgment.

The trial judge (Johnston J.) held that the plaintiffs' rights under the Copyright Act, 1911, subsisted in the Irish Free State at the material date, and that they had been infringed by the defendants ; he granted an injunction as prayed.

The Supreme Court (Kennedy C.J., Fitzgibbon and Murnaghan JJ.) reversed the judgment, and dismissed the action. Fitzgibbon J., in delivering the judgment of the Court, held that at latest by March 31, 1922, when the agreement for a treaty between Great Britain and Ireland was given the force of law, the Irish Free State acquired the status of a self-governing dominion, and thereupon, under s. 25, sub-s. 1, of the Copyright Act, 1911, that Act ceased to extend to the Irish Free State ; he held further that the plaintiffs' rights were not protected by s. 174, sub-s. 1, of the Act of 1927, as they had been acquired after December 6, 1921.

The proceedings in both Courts are reported at [1928] I. R. 506.

The provisions, material to the present appeal, of the constitution enacted by the Irish Free State Constitution Act, 1922, and of the scheduled treaty appear from the judgment of the Board.

1930. Jan. 27, 28, 30, 31; Feb. 24, 25, 27. *Stuart Bevan K.C.* and *Hon. S. O. Henn Collins* for the appellants. It was conceded in the Supreme Court that if the rights claimed by the appellants subsisted in the Irish Free State there had been an infringement by the respondents. The Supreme Court was wrong in holding that the Copyright Act, 1911, did not apply. The definition in s. 35 restricts the meaning of "self-governing dominion" in s. 25, sub-s. 1, to the dominions which it specifically named, Ireland not being included. The Act was therefore in force there when the Irish Free State Constitution Act, 1922, came into operation. Accordingly by art. 73 of the constitution the Act continued of full force and effect until it was repealed by the Irish Free State legislature in 1927. The repeal shows that that was the view of that legislature; see also Act No. 2 of 1922, I. F. S. The effect of the judgment is that there was no law of copyright in force in the Irish Free State until 1927. If the Act of 1911 did not apply, the Copyright Act, 1842, applied, and under that Act the appellants had the same rights as under the Act of 1911. The Act of 1842 applied in Canada until the Canadian Parliament passed an Act which replaced it. The Industrial and Commercial Property (Protection) Act, 1927, while repealing the Act of 1911 retrospectively, preserved the appellants' rights thereunder by s. 174, sub-s. 1, as copyright in each of the pieces was acquired before the date named, although the performing right was assigned to the appellants later. The copyright included the right to assign the performing right. By s. 6, sub-s. 1, of the Act of 1911 the appellants were entitled to civil remedies in protection of their rights, and it was not competent to the Irish Free State legislature to take away

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by retrospective legislation rights under an Act declared by art. 73 of the constitution to be of full force and effect. For the same reason s. 4 of the Copyright (Preservation) Act, 1929, passed after the grant of special leave to appeal, is ultra vires. Even if effect is to be given to that Act in the present appeal, it does not preclude the Board from merely declaring that the judgment of the Supreme Court was wrong in law. The appellants in any case are entitled to have the judgment set aside so far as they were ordered to pay costs, and to have the costs of this appeal. [Upon it appearing that the respondents contended that there had been no infringement by them, it was argued as follows:] The licence held by the band did not cover the performance. The respondents were liable under s. 2, sub-s. 1, in respect of the infringement although the band were not their servants: *Performing Right Society* v. *Ciryl Theatrical Syndicate* (1); *Falcon* v. *Famous Players Film Co.* (2) The correspondence and the answers to interrogatories show that the respondents approved a programme which included the works. They were liable also under s. 2, sub-s. 3, as they permitted the performance; it was for their "private profit" although any profit would have been applied to relief of the rates: *Performing Right Society* v. *Bradford Corporation.* (3)

Battersby K.C. and *Dickie K.C.* (with them *C. S. Campbell*) for the respondents. The contention that the respondents committed no infringement, even if the Act of 1911 subsisted, was not abandoned in the Supreme Court. There was no evidence establishing within the authorities that the respondents either authorized or permitted the band, who were not their servants, to play the two works in question: *Performing Right Society* v. *Ciryl Theatrical Syndicate* (4); *Performing Right Society* v. *Mitchell & Booker (Palais de Danse), Ld.* (5); *Falcon* v. *Famous Players Film Co.* (2); *Donovan* v. *Laing, Wharton and Down Construction Syndicate.* (6) The open bandstand was not ejusdem generis with a

(1) [1924] 1 K. B. 1, 12.
(2) [1926] 2 K. B. 474.
(3) Macgillivray's Copyright Cases, 390.
(4) [1924] 1 K. B. 1.
(5) [1924] 1 K. B. 762.
(6) [1893] 1 Q. B. 629.

theatre, referred to in s. 2, sub-s. 3. Further, the performance was not for their profit, private or otherwise; the decision referred to on that point is distinguishable on the facts, or was erroneous. In any case no injunction should have been granted, as there was no evidence of an intention to repeat the infringement: *Sarpy* v. *Holland.* (1) But the Copyright Act, 1911, was never in force in the Irish Free State. Under the treaty, which was given the force of law by the Irish Free State (Agreement) Act, 1922, the Irish Free State acquired the status of a self-governing dominion; thereupon by the express words of s. 25, sub-s. 1, of the Act of 1911, the Act ceased to extend to it, in the absence of an adoption by the legislature. A contrary view would be inconsistent with art. 1, which provided that the Irish Free State should have the same status as dominions mentioned in s. 35, sub-s. 1, of the Act of 1911, also with s. 3 of the Act of 1922. Neither the treaty nor the above Act of 1922 contained any provision corresponding to s. 61 of the Government of Ireland Act, 1920 (which was repealed in 1922), continuing existing laws. The Act of 1911 having ceased to apply, neither the Provisional Government (Transfer of Functions) Order, 1922, nor art. 73 of the constitution continued it. [Reference was made to *Wakely* v. *Triumph Cycle Co.* (2); *Attorney-General* v. *Great Southern and Western Ry. Co. of Ireland* (3); *In re Reade* (4); *Rex* v. *Circuit Judge for Cork.* (5)] If the Act of 1911 subsisted at all it was only so far as it dealt with works by persons who were citizens of or resident in the Irish Free State, or which were first published there; beyond that the Act was not consistent with the treaty and constitution. The view that the Act had that limited application accords with the principle laid down in *Mayor of Lyons* v. *East India Co.* (6) and *The Lauderdale Peerage.* (7) It was because the Act subsisted, or might subsist, to that extent that the Irish Free State legislature repealed it in 1927.

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(1) [1908] 2 Ch. 198, 211.
(2) [1924] 1 K. B. 214.
(3) [1925] A. C. 754.
(4) [1927] I. R. 31.
(5) [1925] 2 I. R. 165.
(6) (1836) 1 Moo. P. C. 175.
(7) (1885) 10 App. Cas. 692.

The appellants cannot rely upon s. 174, sub-s. 1, of the Act of 1927, because that Act was passed after their cause of action arose: *Ponnamma* v. *Arumogam*. (1) But in any case the appellants' rights were not preserved, as they were acquired after the date named. [Reference was made to s. 154 of the Act of 1927.] If the Act of 1911 was not in force, the legislature was not competent to confer the right, as by art. 43 of the constitution it had no power to declare acts to be an infringement of the law which were not so when they were committed. Under art. 12 of the constitution the Irish Free State legislature had power to enact the retrospective provisions of s. 4 of the Copyright (Preservation) Act, 1929. As by that section there is no jurisdiction to grant relief to the appellants, they are not entitled to a declaration: *Barraclough* v. *Brown*. (2) Lastly, the present appeal is incompetent. Art. 66 of the constitution provides merely that the prerogative right of appeal to His Majesty in Council is not to be thereby "impaired." But there never was a right so to appeal from the decision of an Irish Court. At one period a judgment of a Court in Ireland could be reviewed in England by writ of error or bill in equity: *Dutton* v. *Howell* (3); the Act of 1782, which established Grattan's Parliament, restored the appellate jurisdiction of the House of Lords in Ireland, which had been taken away in 1716, and after the union in 1801 the final appeal was to the House of Lords in England. There is no record at any period of an appeal to His Majesty in Council. If art. 66 gives that right of appeal then, having regard to art. 2 of the constitution, the appeal is to His Majesty in His Irish Privy Council. The preamble to the Judicial Committee Act, 1833, refers to decisions of Courts in India, "and in the plantations, colonies, and other dominions of His Majesty abroad." Ireland was not within any of those categories; consequently even if an appeal lies to His Majesty in Council, the Judicial Committee have not jurisdiction to hear it. [In the course of this part of the argument reference was made also to *Rex* v. *County*

(1) [1905] A. C. 383, 388, 390.
(2) [1897] A. C. 615.
(3) (1693) Show. 24, 33.

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Court Judge of Wicklow (1), and to *Scottish Widows' Fund Life Assurance Society* v. *Blennerhassett.* (2)]

Stuart Bevan K.C. in reply. The question as to the competence of the appeal is concluded by the judgment of the Board delivered by Viscount Haldane in *Hull* v. *M'Kenna.* (3)

April 10. The judgment of their Lordships was delivered by

LORD SANKEY L.C. On September 16, 1926, the Performing Right Society, Ld. (hereinafter called "the appellants"), issued a writ against the Urban District Council of Bray (hereinafter called "the respondents") claiming an injunction to restrain the respondents their servants or agents from infringing the appellants' copyright by performing in public the musical works known as "Venus on Earth" (Lincke) and "Lilac Time" (Schubert, Clutsam). The learned judge (Johnston J.) decided in favour of the appellants. His judgment was reversed by an order of the Supreme Court (Kennedy C.J., Fitzgibbon and Murnaghan JJ.) dated November 15, 1927. The present appeal is from that order.

"Venus on Earth" was composed by a German national, and was first published in Germany in 1897, and the performing right in it was assigned by the composer to the appellants on May 19, 1925. "Lilac Time" was the work of an English national, and was composed in the autumn of 1921. It was assigned by the composer to Messrs. Chappell & Co., Ld., on May 31, 1922, and the performing right was assigned by Messrs. Chappell to the appellants on June 1, 1923.

The statement of claim alleged that the respondents, by their agents or servants, infringed the appellants' copyright by performing in public at their bandstand at Bray an item from "Venus on Earth" and another item from "Lilac Time," and/or by authorizing or permitting the performance thereof in public without the consent of the plaintiffs.

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(1) [1924] 2 I. R. 139.
(2) [1912] A. C. 281.
(3) [1926] I. R. 402.

The respondents had in fact hired a well known Dublin band known as the St. James's Brass and Reed Band, to give concerts at the said bandstand during the summer season, and the two items in question were performed by them.

The appellants claimed: (1.) An injunction under s. 2, sub-s. 1, of the Copyright Act, 1911, to restrain the respondents from infringing the plaintiffs' copyright by performing in public such items; and (2.) An injunction under s. 2, sub-s. 3, of the Copyright Act, 1911, to restrain the respondents from permitting the bandstand to be used for the said performance for their private profit without the consent of the appellants.

The defence put all matters in issue and further contended that the Copyright Act, 1911, was not in force in the Irish Free State at the material time.

The case raises questions as to the effect of the treaty between Great Britain and Ireland, the constitution of the Irish Free State and the enactments consequent thereon, and as to the validity and effect of certain sections of the Industrial and Commercial Property (Protection) Act, passed by the Oireachtas in 1927.

The learned judge of first instance decided in favour of the appellants and granted the injunction asked for. On appeal to the Supreme Court, that Court directed that notice of the appeal stating the constitutional questions involved should be served upon the Attorney-General, and he was represented by counsel who appeared and argued on his behalf. The Supreme Court reversed the decision of the judge of first instance, holding that the Copyright Act, 1911, was not in force in Ireland after, at latest, March 31, 1922. It is true that the Act of 1927 above referred to, part VI. of which is a copyright Act, purported to repeal the Copyright Act, 1911. This repeal was to be retroactive and to operate as from December 6, 1921, the date of the treaty above referred to, but the repeal was not to prejudice rights "acquired before that date." This saving was, however, in the view of the Supreme Court, of no avail to the appellants, because though both the works in question had acquired protection in Ireland before December 6, 1921, the appellants, who took by assignments executed after that date, had not in the opinion of the Supreme Court " acquired their right before December 6, 1921 " ; and since the Act of 1927 did not otherwise preserve or create copyright except in works first published in the Irish Free State, or of which the authors were citizens of, or resident in, the Irish Free State, the appellants were in their view without any protection at all.

On the question of fact, whether the respondents had committed a breach of the Act of 1911, supposing that Act to be in operation, the Supreme Court held as follows: " It appears from the evidence and admissions in the case that upon August 11, 1926, the St. James's Brass and Reed Band performed in a bandstand upon the Bray esplanade a programme of music which included a waltz from ' Venus on Earth ' and a selection from ' Lilac Time.' The bandstand was surrounded by an enclosure and a charge was made for admission. An attempt was made by the defence to show that the performance by the band was under a licence from the plaintiffs, but this ground of defence was practically abandoned and the case proceeded upon the basis that if the plaintiffs possessed the copyright they claimed, the defendants had infringed it and were liable accordingly."

Although the Supreme Court made this statement counsel for the respondents, before dealing with the constitutional questions involved, advanced in the forefront of their argument the contention that no constitutional question arose for decision at all, because (assuming that the Copyright Act, 1911, applied and determined the rights of the parties) upon the facts of the case, no infringement of copyright had been committed within the provisions of that Act.

Objection was taken by the appellants that such a contention was not open to the respondents—on the grounds (amongst others) that the trial judge had found infringement upon the facts and that in the Supreme Court, as was stated in the judgment of that Court, "the case proceeded upon the basis that if the plaintiffs possessed the copyright they claimed, the defendants had infringed it and were liable accordingly." The appellants were, however, willing that the point should be open to the respondents upon the terms that certain correspondence which was scheduled as read in the order of the trial judge should be available for this Board notwithstanding that only one of the letters had been included in the record.

It appeared to their Lordships that it would be impossible for them to attempt to reconsider a finding of fact by the trial judge without having before them all the materials upon which, according to his formal order, he had relied, and which the Supreme Court must have taken into consideration had they been invited to review the judge's finding of infringement. Accordingly their Lordships while allowing the respondents to raise the contention of no infringement, admitted the full correspondence which is scheduled to the order of Johnston J. and were supplied with copies thereof.

In respect of "Venus on Earth" and "Lilac Time" two infringements by the respondents were alleged—namely, (1.) an infringement under s. 2, sub-s. 1, of the Copyright Act, 1911, by performing them in public or authorizing the performance of them in public without the consent of the appellants, and (2.) an infringement under s. 2, sub-s. 3, by permitting the bandstand on the esplanade at Bray to be used for such performance for their private profit without the consent of the appellants.

The respondents, who are the Urban District Council of the town of Bray, Co. Wicklow, engaged the St. James's Brass and Reed Band to play music in the respondents' bandstand on the Bray esplanade for the enjoyment of residents and visitors on various dates in the summer of 1926, one of such dates being August 11, 1926. The band were in no sense the servants of the respondents; they were paid a fee for each visit and certain expenses; but they submitted for the approval of the respondents the programmes of the music which they proposed to perform on different dates. The programme actually performed on August 11, 1926, included "Venus on Earth" and "Lilac Time," and had been approved of beforehand by the respondents. Before such approval had been given the respondents had received from the band's secretary a letter dated June 20, 1926, in the following terms: "Re your letter of 18th inst., I am instructed by my committee to inform you that they, on behalf of our Band, have pleasure in informing you that we, the band, are members of the Performing Right Society Ltd., consequently we can perform in public any or all music in or out of print without fear of infringing of copyright. Enclosed please find a return sheet which I must 'fill in' after a band performance irrespective of place or time. Trusting you understand that your amusement committee will not be liable for any 'item' we play as our licence covers our performance anywhere."

In fact the only justification for the statements contained in that letter was the existence of a licence of July 13, 1925, which is hereinafter referred to.

The respondents made charges for admission to an enclosure of part of the esplanade round the bandstand and for the purchase of programmes. In the respondents' band account for the 1926 season the payments consist of the sums paid to the various bands engaged by them and the wages of certain attendants employed by the respondents: the receipts consist of gate receipts, and payments for chairs and programmes (amounting to 228*l.* 9*s.* 1*d.*) and the proceeds of a 1*d.* rate (amounting to 130*l.*). For the season 1926 a surplus of receipts over expenses is shown amounting to some 69*l.* In respect of the performance on August 11, 1926, the payments to the band exceeded the takings on the esplanade. As already stated, the performing rights in the two compositions in question were vested in the appellants as to "Lilac Time" by an assignment of June 1, 1923, and as to "Venus on Earth" by an assignment dated May 19, 1925.

It is necessary now to consider the defences which have been raised on the facts.

As regards the breaches alleged under s. 2, sub-s. 1, it is suggested (1.) that the performance of the two works was authorized by the licence held by the band and that accordingly there was no performance "without the consent of the owner," and (2.) that although the band performed the works, the respondents neither performed them nor authorized their performance.

In their Lordships' opinion both these defences fail.

As regards the first defence, this turns upon the true construction of the licence. The authorization is contained in clause 1 of the document and is in these terms: "to perform publicly any and every musical work for the time being in the repertoire of the society and of the societies or unions for the time being affiliated thereto for Great Britain and Ireland for occasional performances in the United Kingdom at flower shows, bazaars, public balls, and similar entertainments of an ephemeral nature, at premises having no permanent responsible management, being premises where music is not usually performed as a part of a public entertainment, not exceeding seven consecutive days computed from Sunday to Saturday at any one place of entertainment."

In their Lordships' view the seven consecutive days refer to and impose a limit on the performances under the licence, and the licence only extended to performances at entertainments at premises which have no permanent responsible management and where music is not usually performed as part of a public entertainment. Neither the Bray bandstand nor the Bray esplanade can be said to be premises which answer this description. The performances of the two works accordingly took place without the consent of the appellants. It is true that by the letter of June 20, 1926, the respondents were told that the band could perform any item without infringement of copyright, but even assuming (what was not proved) that the respondents believed and relied upon the statement, innocence is no defence to a charge of infringement of copyright under s. 2, sub-s. 1.

As regards the second ground of defence under s. 2, sub-s. 1, the correspondence and the answer to the sixth interrogatory establish that the respondents approved to be performed by the band, a programme which was performed and which contained the two pieces in question, and accordingly in their Lordships' opinion the respondents authorized the performance in public of "Venus on Earth" and "Lilac Time." Here, again, innocence of infringement is no answer. The offence is complete if (as is the fact) the respondents authorized the performance of a programme which in fact included the two works in question.

In the result the defences to the charge under s. 2, sub-s. 1, fail, and the appellants have made out their claim to an injunction. Their Lordships, however, think that it would have been more appropriate in the present case to restrain the respondents from authorizing the performance of the works rather than to restrain them from performing them.

As regards the breaches alleged under s. 2, sub-s. 3, the respondents raised three contentions: (1.) that the licence authorized the performances; (2.) that the performance was not for private profit; and (3.) that they were not aware and had no reasonable ground for suspecting that the performances would be an infringement of copyright.

The first point has been considered above: the licence did not authorize the performances in question.

As regards the second point, their Lordships are in agreement with the views expressed by Roche J. in *Performing Right Society* v. *Bradford Corporation* (1)—namely, that although the profit, if any, made would only be applicable in relief of the ratepayers, nevertheless the respondents were acting for their private profit within the meaning of the sub-section in that they desired to make a profit out of the concerts so that they should not be a burden on the rates.

As regards the third point, this appears to their Lordships to be a defence which the respondents under the terms of the sub-section were bound to prove affirmatively. This

(1) Macgillivray's Copyright Cases, 309.

they made no attempt to do, and there was no evidence upon which the Court could have found that the defence had been established. The letter of June 20, 1926, does not establish it and indeed is not of itself evidence against the appellants at all.

For these reasons their Lordships are of opinion that if the Copyright Act, 1911, applied to the Irish Free State on August 11, 1926, and if the judgment falls to be framed in accordance with the rights of the parties as they existed at the date of the suit, then the appellants would be entitled to succeed on this appeal.

Their Lordships now turn to the important constitutional and other questions involved. It is urged by the respondents :—

1. That the Board has no jurisdiction to hear this appeal.

2. That the Copyright Act, 1911, was not in force in Ireland after midnight of December 5, 1922, or at any rate only to a limited extent as hereinbefore mentioned.

3. That by s. 174 of the 1927 Act passed by the Oireachtas the Copyright Act, 1911, was in fact repealed with no saving of the appellants' rights.

4. That, by the Act of 1929, entitled the Copyright (Preservation) Act, 1929, passed by the Oireachtas, on July 24 of last year, this Board is prevented from giving any remedy in respect of past infringements by reason of s. 4, the terms of which are set forth in a later part of this judgment.

On December 6, 1921, there was concluded an agreement for a treaty between Great Britain and Ireland, which provided, amongst other things :—

" Article 1. Ireland shall have the same constitutional status in the community of nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

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"Article 2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.

"Article 18. This instrument shall be submitted forthwith by His Majesty's Government for the approval of Parliament and by the Irish signatories to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland, and if approved shall be ratified by the necessary legislation."

By art. 17 provisional arrangement for the administration of Southern Ireland during the interval between December 6, 1921, and the constitution of a Parliament and Government of the Irish Free State in accordance with its terms, was made. The articles of agreement for the treaty were submitted to Dail Eireann, and that assembly by a majority vote passed a resolution on January 17, 1922, approving them. Upon January 14, 1922, the treaty was submitted to a meeting summoned for that purpose of the members elected to sit in the House of Commons of Southern Ireland, and was passed by the unanimous vote of the sixty-six members present. The meeting then proceeded to constitute a provisional government consisting of eight ministers and of such other persons as might from time to time be determined by the ministers for the time being.

On March 31, 1922, by the Irish Free State (Agreement) Act, 1922, the Imperial Parliament gave the force of law to the articles of agreement for the treaty above referred to, as from the date of the passing of that Act. Upon April 1, the Privy Council passed the Provisional Government (Transfer of Functions) Order, 1922, which recited that "departments of the provisional government in Ireland had been constituted by that Government to discharge the functions therein mentioned as assigned to them." This was in accordance with art. 17 of the treaty above referred to, and the Irish Free State (Agreement) Act, 1922, and the functions in connection with the administration of public services in Southern Ireland heretofore performed by existing government departments and officers were transferred to the departments and officers of the provisional government.

On May 27, 1922, the Provisional Government issued a summons for election of members to serve in a Parliament to meet in Dublin on July 1 to frame a constitution for the Irish Free State. It is unnecessary to go into further details of historical facts, and it is sufficient to say that the elections were duly held. The Parliament was prorogued from time to time and did not actually meet till September 9, and upon October 15 it enacted the present constitution of the Irish Free State.

Upon December 5, 1922, the Imperial Parliament passed the Act known as the Irish Free State Constitution Act, 1922, session 2, the preamble of which recited: "Whereas the House of the Parliamant constituted pursuant to the Irish Free State (Agreement) Act, 1922, sitting as a constituent assembly for the settlement of the constitution of the Irish Free State, has passed the measure (hereinafter referred to as "the Constituent Act"), set forth in the schedule to this Act, whereby the constitution appearing as the first schedule to the Constituent Act is declared to be the constitution of the Irish Free State: and whereas by the Constituent Act the said constitution was made subject to the following provisions, namely: the said constitution shall be construed with reference to the articles of agreement for a treaty between Great Britain and Ireland set forth in the second schedule hereto annexed (hereinafter referred to as the scheduled treaty) which are hereby given the force of law, and if any provision of the said constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the scheduled treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further legislation and shall do all such other things as may be necessary to implement the scheduled treaty."

Sect. 1 provides that the constitution set forth in the first schedule to the Constituent Act shall, subject to the provisions to which the same is by the Constituent Act so made subject as aforesaid, be the constitution of the Irish Free State, and shall come into operation on the same being proclaimed by His Majesty in accordance with art. 83 of the said constitution, and the constitution itself is contained in the schedule to the Imperial Act of Parliament.

It will thus be seen that the constitution has been passed by the Parliaments in both countries, but it is to be construed with reference to the articles of agreement for the treaty.

The constitution consists of 83 articles, the last of which provides: "the passing and adoption of this constitution by the Constituent Assembly shall be announced as soon as may be and not later than the sixth day of December, 1922, by proclamation of His Majesty, and this constitution shall come into operation on the issue of such proclamation." As above stated, the 1922 Act was passed by the Imperial Parliament on December 5 of that year, and upon the next day the proclamation referred to in art. 83 was made and the constitution came into operation.

Although, therefore, many interesting legal questions may arise as to the effect of what happened when the Irish Free State became a self-governing dominion, the solution to many of these will be found by referring to and properly interpreting the articles for the treaty and the Irish Free State constitution.

Their Lordships now turn to the various points above mentioned. As to the first point—that there is no jurisdiction in the Board to hear the appeal:

The argument advanced by the learned counsel for the respondents upon this point ranged over a variety of topics and historical incidents, some of which appeared to their Lordships to be hardly germane to the debate. They traced the original jurisdiction of the Privy Council, admitting that anybody in His Majesty's dominions had a right to appeal to the prerogative in the exercise of which His Majesty would be guided by the advice of this Board, but they contended that this right had never been applied to Great Britain or Ireland, as they were separate kingdoms to which the doctrine did not apply. In their Lordships' opinion, however, this point has been concluded by the constitution of the Irish Free State itself. Arts. 64 to 69 set up the Courts of the new Irish State, and art. 66 states: "The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other court, tribunal or authority whatsoever: Provided that nothing in this constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

It will be observed that this proviso declares "that nothing in the constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave." Although these words would appear to be plain and beyond dispute as applied to a case in which such special leave has been duly given, it was contended by the respondents that the proper reading of the words was that nothing should impair the right, *if any*, of any person to petition His Majesty for special leave to appeal, and that there was no right at any time for any person from Ireland so to petition His Majesty in Council. Appeals from Ireland lay to the House of Lords, and therefore there was nothing for the proviso to operate upon.

Their Lordships think that this is a wrong reading of the proviso, which is found in the clauses of the constitution which are to be construed with reference to the articles of agreement for a treaty between Great Britain and Ireland,

and therefore with reference to art. 2 of the treaty, which provides that the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada and that the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State. Accordingly the proviso specifically ensures that the right to petition His Majesty in Council shall subsist by stipulating that nothing shall impair it.

Then it was said that the words "His Majesty in Council" must refer to the Irish Privy Council and not to the Privy Council in England. Their Lordships, by the same reasoning as above, cannot think that the words "His Majesty in Council" as used in the Irish Free State constitution, and in both Acts of Parliament to which it is scheduled, mean anything else than the Privy Council on whose advice His Majesty acts in dealing with appeals from the dominions. Sect. 10 of the Adaptation of Enactments Act, 1922, which runs as follows: "Wherever it is provided in any British Statute that any act or thing shall or may be made or done by Order in Council, or by the King (or Queen) in Council, or by proclamation of the King (or Queen) or of the King (or Queen) in Council, then every such act or thing may be made or done in Saorstát Eireann by an Order of the Governor-General of the Irish Free State upon the advice of the Executive Council of the Irish Free State"—appears to refer only to Orders in Council which in Ireland are now effected by an Order of the Governor-General of the Irish Free State upon the advice of the Executive Council of the Irish Free State. Sect. 10 has not anything to do with the matter under discussion, nor could it alter the plain meaning of the treaty between the new Irish Free State and Great Britain.

Lord Haldane, in *Hull* v. *M'Kenna* (1), said: "The Sovereign, as the Sovereign of the Empire, has retained the prerogative of justice, but by an Imperial Statute to which he assented, that was modified as regards constitutional questions in the case of Australia. That is the only case I need refer to where there has been any modification. In Ireland, under the Constitution Act, by art. 66, the prerogative is saved, and the prerogative therefore exists in Ireland just as it does in Canada, South Africa, India, and right through the Empire with the single exception that I have mentioned—that it is modified in the case of the Commonwealth of Australia in reference to, but only in reference to, constitutional disputes in Australia."

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(1) [1926] I. R. 402, 404.

The Right Honourable Charles Andrew O'Connor, the Master of the Rolls, in the case of *Rex* v. *County Court Judge of Wicklow* (1), said, discussing arts. 66 and 73: "If, therefore, the Courts of the Irish Free State have jurisdiction under the Act" (i.e., the Workmen's Compensation Act) "over persons living in Great Britain, they have been deprived of a legal right previously vested in them. True, there is a right to petition His Majesty for special leave to appeal to His Majesty in Council. But this is not the same thing."

It is not without interest to observe that in the carefully drawn case of the respondents in this appeal as many as twenty reasons were given why the appeal should not be allowed. The point under discussion does not find a place in any of the twenty reasons so carefully prepared, and emerged for the first time on the second day of the hearing of the appeal.

As to the second point, that the Copyright Act, 1911, was not in force in Ireland after midnight on December 5, 1922, or alternatively that it was only in force to such limited extent as protected persons who were citizens of or resident in the Irish Free State, or works first published in the Irish Free State; it is on this question that the Supreme Court differed from the Court of first instance. The reasoning by which the Supreme Court arrived at their determination was as follows:—

The Copyright Act, 1911, provides by s. 25, sub-s. 1, that

(1) [1924] 2 I. R. 139, 147.

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the Act shall extend throughout His Majesty's dominions provided that it shall not extend to a self-governing dominion unless declared by the legislature of that dominion to be in force therein. The legislature of the Irish Free State has made no such declaration. Sect. 35 of the Act defines "self-governing dominion" as meaning the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa and Newfoundland, but the Supreme Court held that at latest by March 31, 1922, when the legislation was passed which gave the force of law to the treaty between Great Britain and Ireland, the Irish Free State acquired the status of a self-governing dominion and in the words of Fitzgibbon J., who gave the judgment of the Court: "though not one of the self-governing dominions named in the Copyright Act of 1911 because it had not then been in existence at all, the Irish Free State became a self-governing dominion within the terms of the Copyright Act, and from that date the Copyright Act of 1911, by the express terms of s. 25, sub-s. 1, ceased to extend to the Irish Free State."

Their Lordships are of opinion that this reasoning is not correct. It might be sound if there was no definition of the phrase "self-governing dominion" in the Act, for then any part of the Empire which became a self-governing dominion subsequent to the passing of the Act might enjoy the advantages conferred by the Act upon such territories. Unfortunately, however, for the argument, as above pointed out, by s. 35 "self-governing dominion" is specifically defined and restricted, and the definition does not include Ireland. The proper way to interpret the Act would be wherever the words "self-governing dominion" occur to read in the definition, and it would then be immediately seen that the words would be "Canada, Australia, New Zealand, South Africa and Newfoundland." It is only by reading into s. 35 of the Copyright Act, 1911, words that it does not contain that the Supreme Court arrived at their conclusion.

An interesting, but not very sound, argument was advanced by the learned counsel for the respondents when he repeatedly asked the question "what laws 'came over' to Ireland with the Treaty?" and he cited *Mayor of Lyons* v. *East India Co.* (1), where Lord Brougham laid down the principle governing the introduction of the English law into a conquered or ceded country; and *The Lauderdale Peerage* case (2), where Lord Blackburn discussing what laws applied to the early English settlers in America said: "When the province of New York was founded by the English settlers who went out there, those English settlers carried with them all the immunities and privileges and laws of England. . . . . The settlers who go out carry out the law so far as it is applicable to their new situation."

Interesting as these questions are, their Lordships do not think they are relevant to the matter under debate. It cannot be said that the position in Ireland was in any way equivalent to the position in America when the pilgrim fathers landed there; on the contrary, Ireland was a highly civilized country which had for generations been living under a code of law, and it is not a question of what laws the Free State "took over." The Free State had laws and institutions at the time of the alteration in the relationship between the two countries, and moreover it is provided by art. 73 of the constitution that: "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Eireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

Their Lordships think that it is not a question of what laws "came over" at the critical moment, but that the right view to take is that by virtue of art. 73 all such laws as were in force immediately before December 6, 1922, continued and remained in force except so far as they were inconsistent with the constitution, and they cannot hold that the Copyright Act, 1911, and its provisions were in any way inconsistent with the constitution. In this their Lordships are confirmed

(1) 1 Moo. P. C. 175.

(2) 10 App. Cas. 692, 744.

by the attitude and opinion of the Irish Parliament itself; by the Industrial and Commercial Property (Protection) Act, 1927, s. 4, it was provided that "the Acts mentioned in the first schedule to the Act are repealed" and one of the Acts so repealed was the Copyright Act, 1911. The Irish legislature evidently thought that the Copyright Act was still in existence, and not only so, but having repealed it, by part 6 of the Act it re-enacted a new code of copyright. Learned counsel for the respondents, faced with this difficulty, was obliged to argue in the somewhat rhetorical phrase already referred to, that although the whole Copyright Act had not "come over," part "came over"; namely, the part referring to works by persons who were citizens of, or resident in, the Irish Free State, and to works first published in the Irish Free State, and therefore it was necessary for the Irish Free State Parliament to repeal that part of the Act which had "come over." The short answer to this argument is that there is no trace of any such idea to be found from first to last in any document, whether Act, treaty or constitution, and no facts and no reasons were given to support it. There is no suggestion in art. 73 that a law may continue but in an amended or modified form; on the contrary such laws as are continued by art. 73 are by its express terms continued "of full force and effect." It is not necessary to lay down what laws did or did not continue in force. One instance of a law that did not continue in force may be found in the case of *Wakely* v. *Triumph Cycle Co.* (1), where it was held that the Judgment Extension Act had ceased to operate in the Irish Free State. This was clearly a case where a new system of judicature having been appointed under the constitution the Judgment Extension Act could not operate in regard thereto. Their Lordships are therefore of opinion that the Copyright Act, 1911, was in force in Ireland after the coming into operation of the constitution.

Their Lordships now turn to the third contention, that by s. 174 of the Industrial and Commercial Property (Protection) Act, 1927, the Copyright Act, 1911, was repealed with no saving of the appellants' rights.

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(1) [1924] 1 K. B. 214.

appellant did not deal in future delivery contracts so habitually and systematically as to constitute those dealings the carrying on of a trade and that the profits were therefore not assessable under Case I. They further held that the dealings were gambling transactions and were not assessable under Case VI. Rowlatt J. reversed the decision of the Commissioners, and his decision was affirmed by the Court of Appeal. Pollock M.R. held that the Commissioners had misdirected themselves and that these transactions were such as to constitute a trade adventure or concern in the nature of trade under Case I., which had been the ground of the decision of Rowlatt J. On the other hand, Warrington L.J. and Atkin L.J., held that the Commissioners' finding under Case I. raised no question of law with which the Court could deal, but that they were wrong in holding that they were wagering transactions, and held that the profits arising from them were chargeable under Case VI. Warrington L.J. says (1): "The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of para. 1 (*b*) of Schedule D. On the findings of the Commissioners themselves they were contracts entered into with a view to making a profit on a rise or fall, as the case might be, in the market price of the contracts. They extended over a considerable number of years. There were large numbers of transactions in each of those years, from which in some years the appellant derived considerable revenue; and for myself I cannot see what there is to exclude that revenue from the tax which is charged under Schedule D. It seems to me, therefore, that, in this case, whatever may be the case under different facts, at all events the profits made by these transactions are annual profits or gains, and must be assessable to income tax." In my opinion, that case also affords a contrast to the present case, where the transaction was an isolated one, for the fact that there were

(1) [1925] 2 K. B. 753, 769.

Lord Thankerton.

two options acquired does not appear to me to deprive the transaction of that character.

Accordingly I am of opinion that the profit here in question was in the nature of a capital accretion and was not "profits or gains" chargeable to income tax under Case VI. and I concur in the motion proposed.

LORD MACMILLAN. My Lords, the Commissioners, having had their attention specially directed to the point by a remit from Rowlatt J., have found that "the transaction in question was not a concern in the nature of trade." The learned Attorney-General submitted that in strict logic this finding did not exhaustively exclude from Case I. of Schedule D the profits or gains arising from the transaction, inasmuch as under Case I. tax is chargeable in respect of any trade not contained in any other Schedule and "trade" by s. 237 of the Income Tax Act, 1918, "includes every trade, manufacture, adventure or concern in the nature of trade." Therefore, he argued, a finding that the transaction was not "a concern in the nature of trade" still left it open to him to maintain that it was an "adventure." But the Commissioners have not found that it was an "adventure." On the contrary, inasmuch as an "adventure" in this context must plainly be a trading adventure, their general finding that the transaction was "not a concern in the nature of trade" is sufficient to negative the suggestion that it was a trading adventure.

The transaction being thus excluded from charge under Case I., it was maintained that it fell within Case VI., which subjects to tax any annual profits or gains not falling under any of the preceding Cases and not charged by virtue of any other Schedule. The difficulty which here confronts the Crown is that the profit made by the respondent was the result of an isolated transaction of sale but not of a transaction of sale by way of trade and it is not easy to see how the profit on an isolated sale which is not a trading transaction can be other than a capital accretion and so outside the category of annual profits or gains. The case of *Cooper* v. *Stubbs* (1),

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and made effective its disapproval in the declaration in a contrary sense contained in s. 1. But art. 43 of the constitution provides that: "The Oireachtas shall have no power to declare acts to be infringements of the law which were not so at the date of their commission."

With this article in view the legislature may well have thought it necessary to insert s. 4 in the statute. That the law of the Irish Free State, as now appears from this judgment, was in truth at the date of the decision of the Supreme Court what the Oireachtas in this statute has declared it to be and always to have been cannot abridge the effect of s. 4, which, until repealed, as it may now be, must have full effect given to it by all Courts.

With the provisions of s. 4 in view it remains now for their Lordships to determine the advice which they may properly tender to His Majesty. If they were to advise that the decree of the Supreme Court be discharged, the result might be indirectly to restore the order of the trial judge against the respondents. For that reason, although the basis on which the decree of the Supreme Court was rested has commended itself neither to the Irish legislature nor to the Board, their Lordships are not in a position to recommend that it be discharged altogether.

But the order for payment of costs by the appellants contained in that decree was neither in accord with the actual rights of the parties at its date, nor is it in accord with those rights as now by statute declared. It is right, therefore, that that part of the order should be discharged, there being nothing in the Act of 1929 which stands in the way of such a direction being given. Such a discharge need not disturb anything actually done under the order, because their Lordships were informed that the costs by the order awarded had neither been paid nor even taxed.

In these circumstances, their Lordships are of opinion that the proper course is to discharge the order of the Supreme Court appealed from in so far as it directs payment of costs, but not further or otherwise, and their Lordships will humbly advise His Majesty accordingly.

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Much of the hearing before the Board was taken up with an argument by the respondents on the above questions of fact, in the course of which they set up a case, which, already neglected or abandoned in Ireland, was not in itself, as has been shown, even tenable.

In these circumstances there ought in their Lordships' judgment to be no order as to the costs of the appeal.

Solicitors for appellants: *Syrett & Sons.*
Solicitors for respondents: *Burchells.*

[HOUSE OF LORDS.]

H. L. (E.)*
1930
Feb. 6.

EXCELSIOR WIRE ROPE COMPANY, LIMITED . . . . APPELLANTS;

AND

CALLAN AND OTHERS . . . . . . RESPONDENTS.

Negligence—Dangerous Machine—Injury to Child—Trespasser or Licensee—Liability of Owner.

A company having works near a railway, under a licence from an adjoining landowner, constructed a siding on his land and erected thereon a post to which a pulley block was attached called a sheave. To move a truck along the siding, a wire rope passed through the sheave and round a winch worked by a dynamo, and one end of the rope was fastened to the front of the truck and the other to the back. The siding adjoined some fields which were let to the local authority as a playground. A boundary fence between the siding and the fields had disappeared, and, to the knowledge of the company, children frequented the siding and played round the sheave without interruption except when the haulage machinery was about to be put in motion, which occurred about three times a week. On one occasion when a truck had to be moved two of the company's employees, in accordance with their usual practice, walked to the sheave for the purpose of seeing that the rope was properly adjusted and of driving children away. After the men went back to start the machine a little girl, aged five, was seen swinging on the rope, and the movement of the rope caused her hands to be caught in the pulley and crushed, and her brother, aged nine, was similarly injured in coming to her rescue. The father, for himself and as next friend of the children, claimed damages against the company for the injuries sustained by the children:—

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and LORD THANKERTON.

Held, that, it being well known to the company that when the machine was going to start it was extremely likely that children would be near the sheave, the duty owed by the company when they set the machine in motion was to see that no child was in such a position as to be exposed to danger by the occasional use to which the machine was put, and that they had failed in that duty.

The immediate danger being apparent, it was not material whether the children were or were not trespassers.

Appeal from an order of the Court of Appeal affirming a judgment of Shearman J. at the trial of the action in favour of the respondents.

The action was a consolidated action brought by the two infant respondents Leslie Daniel Callan and Eileen Callan and by the respondent John Patrick Callan, their father, to recover damages for serious personal injuries sustained by the infant respondents. The respondent Eileen Callan was injured while playing with a wire rope forming part of a haulage system used by the appellants to move trucks over a private railway siding constructed under licence from the Marquess of Bute on land owned by him. The respondent Leslie Daniel Callan was injured while endeavouring to assist his sister after her hand had been caught in the apparatus forming part of the haulage system.

The facts are fully stated in the opinion of Lord Buckmaster and are summarized in the headnote.

Shearman J. held that the appellants were liable on the ground that the appellants had acquiesced in children frequenting the siding, so as to constitute the children licensees, and that the setting in motion of the haulage apparatus constituted a trap, and he gave judgment for the respondents for damages amounting in the aggregate to 1523*l*. 10*s*.

The Court of Appeal (Scrutton, Lawrence and Sankey L.JJ.), without calling on the respondents' counsel, affirmed the judgment of Shearman J., but on different grounds. The Lords Justices proceeded on the assumption that the children were trespassers, and held that their injuries were caused by an act done by the appellants' servants with reckless

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disregard of the presence of children whom they had every reason to think might be injured.

1930. Feb. 4, 6. *Croom-Johnson K.C.* and *Astell Burt* for the appellants. Upon the evidence these children were trespassers. They were therefore on the siding at their own risk and the appellants owed no duty to take reasonable care for their protection. They were only liable for some act done with the deliberate intention of injuring them or at least with reckless disregard of their presence. This point was not raised at the trial and there is no justification for the view of the Court of Appeal that the injuries to the infant respondents were intentionally caused by the appellants' servants, in the sense that they gave a signal for the rope to move without looking to see whether a child was in a place where the rope would injure it. In the case of trespass the liability of the landowner is the same whether the trespasser is a child or an adult, because, if there is no duty to take care, that cannot vary according to who is the trespasser. The fact that the appellants, through their servants, knew that children might be trespassing on the siding imposes upon them no duty to take precautions for their safety. *Haughton* v. *North British Ry. Co.* (1) proceeded on the view that the defenders' servants knew that a child was on the line at the time, and is distinguishable on that ground. *Lowery* v. *Walker* (2) also is not opposed to the appellants' contention, because the House came to the conclusion that the finding of the county court judge amounted to a decision that the plaintiff was a licensee. This case is indistinguishable from *Robert Addie & Sons (Collieries), Ld.* v. *Dumbreck* (3), which was decided by this House after the decision of the Court of Appeal in the present case. The appellants rely on the principle stated by Scrutton L.J. in *Hardy* v. *Central London Ry. Co.* (4), approved by Lord Hailsham L.C. in *Addie's* case (3), that a landowner is under no liability if, in trespassing, children injure themselves on objects legitimately on his land in the course of his business.

(1) (1892) 20 R. 113.
(2) [1911] A. C. 10.
(3) [1929] A. C. 358.
(4) [1920] 3 K. B. 459, 473.

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[They also referred to *Bolch* v. *Smith*. (1)]

A. T. James K.C. and *Vyrnwy Lewis* for the respondents were not called on.

Lord Buckmaster. My Lords, the appellants in this case are a firm of wire rope manufacturers who have their works near Cardiff. The actual site of their factory is a triangular piece of ground which is bounded on the south by the Glamorganshire Canal; on the west by certain playing fields, to which I will refer more particularly in a moment; and on the east by other business premises. The lease of the works was granted to the appellants in 1902. On one side of the land so granted to them there was a line of rails which ran up to and effected a junction with the Great Western Railway. In 1904 the appellant obtained permission to put what was called a block upon a piece of land belonging to the Marquess of Bute, which was intended to be used in connection with a line that they had built, or were preparing to build, to enable trucks to be taken from their works and pass over the junction between that line which was then in contemplation and the line already there, and by this means to enable access to be obtained for their goods to and from the Great Western Railway. The block was necessarily some few yards, perhaps about 25 yards or so, beyond the actual point of junction of the two lines—the exact distance does not matter. The appellants obtained no estate or interest in the land on which the block was built; they merely obtained a licence to place it there, and there were no measured dimensions of the spot of land they were to occupy, but in accordance with their licence they placed, first of all, a stone slab, and on that a post about three feet high. To this post there was attached a large pulley round which ran a wire rope running down to their works, and whenever they wanted to move a truck they fastened the wire rope on at each end of the truck, put the wire rope in action by some motive power they had at their works, and by this means ran the truck backwards and forwards in the way I have described. This machinery was not in constant use; it is said that it was used about three times a week, and the period of its operation would be about three minutes.

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(1) (1862) 7 H. & N. 736.

Now it appears that in 1924 the Cardiff Corporation obtained from the Marquess of Bute the tenancy of a very large block of land lying to the immediate west of the factory, called the Lock Fields. There was originally a fence of some kind that ran between the actual boundary of this land and the place where the block and the post had been put up, but that fence has completely disappeared, all that is now left of it being the stone slab which formed the footstep for the stile by which the fence was crossed. As matters are now, the post standing on the block, the sheave or pulley and the wire rope round it stand actually adjoining these Lock Fields, separated only by a road or pathway which is not in the possession of the Cardiff Corporation, and is in no way fenced or protected so as to prevent its common use in connection with the fields. The Cardiff Corporation acquired these fields for the express purpose of turning them into playing fields, and they are so used. The evidence is that they are so used, among others, by children, who, the policeman says, swarm there. There can be no doubt, either, that just round the spot where the block and the pulley stand is a very attractive place for children, because close to it are a number of bushes which do not appear to be found elsewhere on the land, and just behind these bushes runs a little stream, which has been providentially provided with a sufficient number of small fish to enable the children to spend their time there in the hope of catching some. The evidence is quite clear, and, to my mind, is in accordance with the probabilities of the case, that the children actually use the post to which this pulley is attached for the purpose of their games. They play a sort of hide-and-seek in and out of the bushes, and a game which is something like prisoner's base in which the stone slab on which the post stands is called "Home." These facts were obvious to the employees of the Excelsior Wire Rope Works, and it appears to me to be an undoubted inference from the facts that they knew the children swarmed round there, and that they certainly knew they played with the wire. I have not any doubt myself that the only reasonable inference one can draw is that the appellants through their workmen understood that the children did what children necessarily would do, that is, use that post and the adjoining bushes for the purpose of their games. There is some evidence to show that the children were mischievous, and have broken lamps by the side of the path; but that appears to me to be totally irrelevant. It really is a ridiculous thing to imagine that you can expect the same gravity and decorum from children as that which is sometimes associated with advanced years, and for the purposes of this case it is important to remember that the duty which we are about to examine is a duty to these children.

What happened was this: On August 5, 1927, the Excelsior Wire Rope Works were going to use this line for one of their trucks. There is evidence that just before it was in fact so used a little child was seen swinging on the wire. What actually happened is a matter about which there is no direct testimony at all. There were two men whose business it was to superintend the operations, one named Williams and the other named Osborne, and they both came up to the sheave for the purpose, no doubt, of seeing that the wire was properly put round the pulley, and also for the purpose of driving the children away. They knew the children would be there, and because of that knowledge, before putting the wire in motion, they used to go and send them away. The question put and the answer given by one of the witnesses named Osborne is quite clear upon the point: "(Q.) In order to see whether there are children about there, is it necessary for you to go down to the sheave? (A.) We cannot start the thing without going down there." He accepts the position that the children swarmed about the place, and he is asked again: "(Q.) Do you say before you start moving the trucks you always go down so far as the sheave and warn any children that there may be there? (A.) Yes. (Q.) You do that because you know children are in the habit of playing round the sheave, I suppose? (A.) No, not on purpose for that, because we would always go there before starting to move a truck." There is no doubt that these people do what is obviously their duty to do in the circumstances, that is, go and adjust the wire, and when doing that see if there are any children before they start the work. They did that on this occasion, but they went back and started the machinery without being clear that the wire was free from children, and one little child who was either sitting on it or playing with it—what she was actually doing no one knows—got her hands entangled in the machinery, and her little brother, who came to help her, got his hand injured too. It is in respect of those injuries that these proceedings have arisen, and it is argued that in the circumstances there was no duty whatever on the part of the Excelsior Wire Rope Company to these children, and consequently the action must fail.

My Lords, if I have adequately explained the facts as they present themselves to my mind, they answer the whole proposition. To the knowledge of the Excelsior Wire Rope Company these children played uninterruptedly round this post; there was nothing to prevent them doing it, and I cannot find that there is any evidence to show that, except at the moment when this machine was going to be set in action, they were ever driven away. It was therefore well known to the appellants that when this machine was going to start it was extremely likely that children would be there and, with the wire in motion, would be exposed to grave danger.

In such circumstances the duty owed by appellants, when they set the machinery in motion, was to see that no child was there, and this duty they failed to discharge.

My Lords, for these reasons I think this appeal should be dismissed.

VISCOUNT DUNEDIN. My Lords, I agree. In *Addie's* case (1) I called attention to the necessity, in order to find the criterion of duty, to fix within which of the three classes of invitees, licensees, or trespassers a person falls; but the negligence here was such that, inasmuch as the greater always includes the less, it does not matter in which class you find him. Assuming, as did Scrutton L.J., that the children were trespassers, I think that, to use the words of Viscount Hailsham in *Addie's* case, the appellants' servants acted "with reckless disregard of the presence of the trespasser"; or, to use my own, "that the acting was so reckless as to amount to malicious acting." But I wish emphatically to state that the mere fact that the appellants were not occupiers of the land on which the sheave was placed does not in my judgment remove the case from the category of those cases where the land was in the occupation of the person owning the dangerous machine. The appellants here had the right to keep children away from the sheave, and if it had been necessary I would have been prepared to find that the children were licensees in the sense of the decided cases, because I think that the word "licensee" in the cases that have to do with this subject, though not probably a perfectly accurate word, is certainly intended to include another class, if you so call it, which I may coin a word to represent—namely, a permittee. And, though the ground on which the post stood did not belong to the appellants, yet the post was in their charge and it was they who permitted the children to use the post as they did.

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(1) [1929] A. C. 358.

Lord Warrington of Clyffe. My Lords, I entirely agree, and I only desire to add a very few words.

The question whether the children were invitees, licensees or trespassers for the purpose of a case in which the defendant has a dangerous machine on his own land is not a question which need engage our attention in this case. There is ample evidence that, to the knowledge of the servants of the appellants, children were in the habit, not only of playing around this sheave and using it for purposes connected with their games, but were actually in the habit of playing with the machine, and the ropes and so forth attached to it, so

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that it was found necessary, when they were about to use the machine, to see that it had not been put out of gear by the children. Under those circumstances, it seems to me quite plain that there was a duty upon the present appellants, by their servants, when they were about to put this machine in motion, so that it would become a danger to any children who might be in the neighbourhood, to see whether or not at that moment there were children in such a position as to be exposed to danger. That duty was plainly neglected, and under the circumstances I think the appellants have rightly been held liable.

LORD ATKIN. My Lords, I agree with the reasons which have been put before your Lordships by the noble Lord on the Woolsack.

My Lords, in cases of a similar kind questions have arisen in respect to the duty owed by owners of property or occupiers of property in relation to dangers which exist upon that property, whether they are dangers inherent to the nature of the soil, or whether they are the result of an interference with it by the owner or occupier either by placing machinery upon it or otherwise. There has arisen in respect to the duties of owners and occupiers of land an elaborate series of decisions which have involved the consideration of the precise difference between invitees of the occupiers, licensees of the occupiers, or trespassers upon the land. In my view, in this case none of those questions is relevant, and that particular branch of the law which deals with the obligations of occupiers of land towards those persons who come upon the land is not at issue at all in this particular case. The defendants in this case were not occupiers of the land in question. They had had a right from the Marquess of Bute, who in fact owned the land, and, as far as I can see on the evidence, was the occupier of the land, to place a line of rails upon it, and there was specially reserved, if reservation is the right phrase, but, at any rate, it was expressly made clear in the lease, that the Marquess of Bute retained the right to make what use he pleased of the land upon which the siding was placed, subject to there being no unreasonable interference with the use of the siding. A similar position existed in reference to the erection of this particular hauling machinery that was placed upon this siding. In those circumstances, my Lords, the only question that appears to me to arise is: What was the obligation on the owners of this hauling machinery to persons who might be endangered by its use? When once the facts which have been stated by my noble and learned friend on the Woolsack have been ascertained, the question of the duty is indisputable. There was a swarm of children frequenting the spot where this machine was used, and frequenting it to the knowledge of the owners of the machine, and it appears to me that they owed a duty to these children to take reasonable precautions to see that the children were not injured by the occasional use to which the owners put that dangerous machine. My Lords, it follows from that that the judgment appealed from was right. I myself would feel a difficulty in putting the case precisely upon the ground on which it was put by the learned trial judge, because I think he has been rather led to consider the case from the point of view of the liability of the occupiers of the land, which these defendants were not. On the facts as they now emerge it appears to me quite plain that the defendants committed a breach of their duty to these children, and that the judgment against them was right.

LORD THANKERTON. My Lords, I agree. The normal class of case which has arisen and which is illustrated by the recent case in your Lordships' House, of *Robert Addie & Sons (Collieries), Ld.* v. *Dumbreck* (1), is where the main question at issue concerns the capacity in which the person injured got access to the property in question, and thereby to the dangerous machine, or whatever did the injury. In the present case it seems to me that there can be no issue as regards that point. As has been pointed out by your Lordships already, the appellants here were mere licensees, and

(1) [1929] A. C. 358.

in fact, as has also been pointed out, the children not only had constant and free access to the machine itself, but clearly to the knowledge of the appellants they were in the habit of interfering and playing with both the post and the wire rope, and it was only when the occasion of putting the machine into operation arose that there was any question of keeping the children away from that spot. My Lords, that last fact itself appears to me to recognize a necessity and a duty to see that the children were away from this dangerous machine. As regards the necessary conclusions from that, I agree entirely with what your Lordships have said.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, February 6, 1930.

Solicitors for the appellants: *Wedlake, Letts & Birds.*

Solicitors for the respondents: *Bell, Brodrick & Gray, for Frank Hill & Co., Cardiff.*

[HOUSE OF LORDS.]

JONES . . . . APPELLANT ; H. L. (E.)*

AND 1930

LEEMING . . . . RESPONDENT. *March* 18.

Revenue—Income Tax—Purchase and Resale of Option to purchase Real Estate—Isolated Transaction—Trading negatived by Commissioners—Annual Profits or Gains—Accretion of Capital—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I. and VI.*

The respondent joined with three other persons in obtaining an option to purchase a rubber estate in the Malay Peninsula. As the estate was too small for resale to a company for public flotation, they acquired a further option to purchase an adjoining estate. Ultimately the two estates were sold to a company at a profit. The respondent having been assessed to income tax on a sum representing his net share of the profit appealed. The Commissioners found that the respondent acquired the property or interest in the property with the sole object of turning it over again at a profit, and that he at no time had any intention of holding the property or interest as an investment, and confirmed the assessment. They subsequently found, on the case being referred back to them, that the transaction was not a concern in the nature of trade :—

Held, that having regard to the finding of the Commissioners that the transaction was not a concern in the nature of trade, and to its being an isolated transaction of purchase and resale of property, the profits arising therefrom were not in the nature of income but were an accretion to capital, and were therefore not subject to tax under Case VI. of Sch. D of the Income Tax Act, 1918.

Pearn v. *Miller* (1927) 11 Tax Cas. 610 approved.

Cooper v. *Stubbs* [1925] 2 K. B. 753 distinguished.

Decision of the Court of Appeal [1930] 1 K. B. 279 affirmed.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Lawrence and Slesser L.JJ.) affirming an order of Rowlatt J. which reversed a determination of the Commissioners for the General Purposes of the Income Tax Acts for the Division of Leath Ward of the County of Cumberland. (1)

The facts are fully set out in the report of the case in the Courts below and are summarized in the headnote.

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* *Present :* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, and LORD MACMILLAN.

(1) [1930] 1 K. B. 279.

1930. Feb. 18. *Sir William Jowitt A.-G.* and *Reginald Hills* for the appellant. The finding of the Commissioners that the respondent acquired his interest in the options with the sole object of turning it over again at a profit and that he never had any intention of holding it as an investment shows that the profit resulting therefrom arose from revenue account in the course of a scheme of profit making, and negatives the idea that it was a capital accretion not chargeable to income tax. Schedule D taxes " annual " profits and gains, and that qualification applies to the whole of the Schedule. Accordingly it is said that a man cannot be taxed on a casual or isolated transaction. But the term " annual " as used in Schedule D does not necessarily imply recurrence ; it may refer simply to profits and gains accruing in the year of charge: per Viscount Cave L.C. in *Martin* v. *Lowry* (1) approving a dictum of Rowlatt J. in *Ryall* v. *Hoare* (2); *Rutledge* v. *Inland Revenue Commissioners.* (3) Take the case of a single underwriting transaction, or of a single letting of a furnished house, or of the employment of a gentleman jockey to ride in the Grand National. All those transactions would be amenable to income tax.

[*Latter K.C.* The liability to tax in the case of letting a furnished house has been doubted by Lord Sumner and Lord Carson in *Martin* v. *Lowry.* (4)]

The supplemental finding of the Commissioners prevents the profit arising from the sale of these options from falling within Case I., but in any event it falls within Case VI. : *Cooper* v. *Stubbs.* (5)

[They also referred to *Malcolm* v. *Lockhart* (6) ; *Commissioner of Taxes* v. *Melbourne Trust* (7) ; and *Pearn* v. *Miller.* (8)]

Latter K.C. and *A. M. B. Bremner* for the respondent were not called upon.

The House took time for consideration.

(1) [1927] A. C. 312, 315.
(2) [1923] 2 K. B. 447.
(3) (1929) 14 Tax Cas. 490.
(4) [1927] A. C. 316, 317.
(5) [1925] 2 K. B. 753.
(6) [1919] A. C. 463.
(7) [1914] A. C. 1001.
(8) 11 Tax Cas. 610.

1930. March 18. LORD BUCKMASTER. My Lords, to examine the question raised on this appeal it is necessary to follow closely its history before the Commissioners and Rowlatt J. The following is a summary of the facts as stated in the special case. Mr. James Leeming, the respondent, joined with a limited company, a business firm, and a solicitor named Carruthers in acquiring two options to purchase certain rubber estates in Malay. The option on the first estate and presumably on both, though it is not so stated, was taken in the name of Mr. Carruthers but on behalf of all four participants.

It appears, though again it is not definitely found, that the intention throughout was to acquire the rights for the purpose of resale "to a company for public flotation," and to carry this scheme into effect Mr. Carruthers transferred the joint rights to a company known as the Oceanic Investment Company, who thereupon promoted another company called Ipoh Rubber Estate, Ld., to whom the properties were resold. The transaction resulted in a profit, of which respondent's share was 623*l.*, and in respect of this sum he was assessed to income tax. Upon appeal to the Commissioners this assessment was reduced to 603*l.* 10*s.*, and so reduced was confirmed. Upon appeal from the Commissioners to Rowlatt J., he was of opinion that the Commissioners had not found sufficient facts to enable him to decide the question, and he ordered that the case be remitted to them to find whether there was or was not a concern in the nature of trade.

The learned judge was clearly right in the course he took. There were no findings whatever in the special case to enable the Court to know whether the respondent was a company promoter and whether this transaction stood alone, or was one of a series of transactions capable of being linked together so as to constitute a business or to produce income. Nor was the original purpose of the transaction ever set out; it was only to be inferred by the subsequent dealings.

In obedience to the order of the learned judge the Commissioners in a supplementary case found that the transaction "was not a concern in the nature of trade," and thereupon Rowlatt J., following, as he stated, his own decision in *Pearn* v. *Miller* (1), allowed the appeal. His judgment was affirmed by the Court of Appeal from whom the Crown has brought the case before this House.

The decision necessarily depends upon the construction of certain sections in the Income Tax Act. These sections are few in number and short in terms, but none the less they are not easy to construe.

Sect. 1 of the Act is well known. It provides that income tax shall be charged "in respect of all property, profits, or gains described or comprised in the Schedules marked A, B, C, D, and E respectively contained in the First Schedule to this Act, and in accordance with the Rules respectively applicable to those Schedules."

This, which is the governing section of the Act, needs no comment beyond that which has often been made before—namely, that the tax is an income tax and charged on income as distinct from capital.

Schedule D, the only one suggested as applicable to the present case, opens by saying the tax is charged on "the annual profits or gains arising or accruing to certain named classes of persons from any trade, profession, employment, or vocation" within the United Kingdom, and "all interest of money, annuities and other annual profits or gains" not otherwise charged and not specially exempted from tax. By sub-s. 2 it is provided that tax shall be charged under this Schedule under the following cases: "2. Tax under this Schedule shall be charged under the following cases respectively, that is to say: Case I. Tax in respect of any trade not contained in any other Schedule; Case II. Tax in respect of any profession, employment, or vocation not contained in any other Schedule; Case III. Tax in respect of profits of an uncertain value and of other income described in the Rules applicable to this Case; Case IV. Tax in respect of income arising from securities out of the United Kingdom, except such income as is charged under Schedule C; Case V.

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(1) 11 Tax Cas. 610.

Tax in respect of income arising from possessions out of the United Kingdom; Case VI. Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule; and subject to and in accordance with the rules applicable to the said Cases respectively."

Rules applicable to Case III. state that the tax shall extend to any interest of money whether yearly or otherwise or other annual payment . . . . and to "all discounts," while s. 237 declares that "trade includes every trade, manufacture, adventure or concern in the nature of trade."

It is necessary to set out these familiar provisions in order to give full weight to the contention of the Crown. The supplementary finding of the Commissioners excludes Case I. of r. 2, but that leaves open the possibility of the claim being included under Case VI., and it is under that case that it is sought to establish the appeal. The word "annual," it is said, must be either disregarded or so limited as to enable a solitary isolated transaction such as that in the present case to be within the phrase. It is unnecessary to consider what is the right interpretation of this word, but I am not prepared to disregard a word designed to qualify the burden of taxation and I cannot see how on any interpretation of its meaning it can cover the present case. The words of the Rule relating to interest on which the Attorney-General relied as showing that any receipt under that head for any period was taxable do not seem to me to advance the argument; they apply to a totally different case. All interest is expressly taxed by the words of the Rule, and discount is in reality only interest in another form and under another name. Further, Case III. itself contemplates in accordance with the scheme of the Act that it is as "income" that the moneys are made liable.

This brings the argument back to the original position. Can the profits made in this case be described as income? Were the respondent a company promoter or were his business associated with purchase and sale of estates, wholly different considerations would apply, but this is negatived;

the transaction in this case stands isolated and alone. It is to my mind, in the circumstances, purely an affair of capital. I can see no difference between it and what might have happened had the respondent bought shares in two companies which were going to be amalgamated, and then sold equivalent shares in the amalgamated company at a profit; an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realization does not make it income. If the Crown's contention were sound the same result would have arisen had the respondent taken shares in the company instead of cash, even though unrealized.

No authority could be quoted in support of the appeal; the nearest was the case of *Cooper* v. *Stubbs* (1), and its distance away, were such computation possible, could be measured in miles. Although the Commissioners there found that the man sought to be charged did not carry on a trade, his profits were none the less held liable to tax under 2, Case VI. The reasons for this conclusion are clearly stated by Lord Warrington, who was then sitting in the Court of Appeal, in these words: "The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of paragraph 1 (*b*) of Schedule D. On the findings of the Commissioners themselves they were contracts entered into with a view to making a profit on a rise or fall, as the case might be, in the market price of the contracts. They extended over a considerable number of years. There were large numbers of transactions in each of those years, from which in some years the appellant derived considerable revenue; and for myself I cannot see what there is to exclude that revenue from the tax which is charged under Schedule D. It seems to me, therefore, that, in this case, whatever may be the case under different facts, at all events the profits made by these transactions are annual profits or gains, and must be assessable to income tax."

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(1) [1925] 2 K. B. 753, 769.

No one of the conditions there mentioned applies here.

Lawrence L.J. appears to me to have accurately stated the difficulty in the appellant's way in the following words (1): "It seems to me in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property."

To that proposition I can see no adequate answer, and for that reason and those I have given, I think this appeal must fail.

VISCOUNT DUNEDIN. My Lords, this case is a striking example of the class of appeal in income tax cases, which on a recent occasion I felt bound to deprecate. There is no new question of law involved in it, merely the application of old principles to the particular facts. There has been an unanimous judgment of the judge of first instance and of the three judges of the Court of Appeal against the Crown, and the sum at stake is 130*l.* 12*s.* The case itself is one of the simplest. The respondent, with three other persons, went into a speculation of buying a piece of real property and reselling it. It was, as far as he was concerned, an isolated transaction, and when I say isolated I mean that there was no evidence to show that the respondent had done anything like this before, or was likely to do it again. The Commissioners had found generally that he must be taxed on the profit which arose to him out of the transaction, amounting to 603*l.*, but had not specified whether they thought the case fell under Case I. or Case VI. of Schedule D. Rowlatt J., before whom the case came to depend, was particularly careful in the matter. He returned the case to the Commissioners to specify whether they considered there was or was not a concern in the nature of trade. Doubtless he remembered his own dictum in *Ryall* v. *Hoare* (2): "A casual profit made on an isolated purchase and sale, unless merged with similar transactions in the carrying on of a trade or business is not liable to tax," and thought there might have been circumstances within the knowledge of the Commissioners which had not been stated in the case. They returned answer that there was not. That took the matter out of the provisions of Case I. The counsel for the Crown then said that the case fell within Case VI. Now, Case VI. sweeps up all sorts of annual profits and gains which have not been included in the other five heads, but it has been settled again and again that that does not mean that anything that is a profit or gain falls to be taxed. Case VI. necessarily refers to the words of Schedule D, that is to say, it must be a case of annual profits and gains, and those words again are ruled by the first section of the Act, which says that when an Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged in respect of the profits and gains according to the Schedules.

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(1) [1930] 1 K. B. 279, 302.

(2) [1923] 2 K. B. 447, 454.

The limitations of the words "profits and gains" were pointed out by Blackburn J. long ago in the case of *Attorney-General* v. *Black* (1), when he said that profits and gains in Case VI. must mean profits and gains ejusdem generis with the profits and gains specified in the preceding five Cases. And then there came the memorable and often quoted words of Lord Macnaghten in the *London County Council* case (2), when he begged to remind people "that income tax is a tax on income." The only question, therefore, here was —Was there in any sense income? It is quite true that, as the counsel for the Crown said, the word "annual" does not mean something that recurs every year, but none the less the receipt must be of the nature of income. Lawrence L.J. put the matter very succinctly when he said (3): "It seems to me that in the case of an isolated transaction of the sale and re-sale of property, there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property." It was sought to assail this dictum by quoting *Cooper* v. *Stubbs* (1), where there was a finding, as here, that no trade had been carried on and yet the tax was imposed. But the answer is simple, the whole point of *Cooper* v. *Stubbs* was that the transaction was not an isolated transaction. Warrington L.J. says that the transactions extended over a considerable period of years, and Atkin L.J. says that an annual profit or gain must be something which is of the nature of revenue or income, and he points out that the transactions in that case had been going on for eight years running. The last argument of the counsel for the Crown was that there was a finding that the respondent never meant to hold the land bought as an investment. The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments, but per se it leads to no conclusion whatever.

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(1) (1871) L. R. 6 Ex. 308, 309.
(2) [1901] A. C. 26, 35.
(3) [1930] 1 K. B. 279, 302.

I therefore concur in the motion made and beg to add that it is an exceedingly simple case.

LORD WARRINGTON OF CLYFFE. My Lords, this is an appeal by the Crown from an order of the Court of Appeal affirming an order of Rowlatt J., whereby he discharged an assessment to income tax for the year ended April 5, 1926, made against the respondent in respect of a sum of 603*l*. 10*s*.

The assessment was made under Schedule D, the Crown contending that the respondent was liable either under Case I. or Case VI.

In August, 1925, the respondent and certain other persons acquired an option over a certain rubber estate at Ipoh with a view to the subsequent transfer thereof at a profit to a company to be formed for the purpose.

In September of the same year the respondent and the same persons acquired an option over an adjoining estate with the object of enlarging the area of property at their disposal.

They subsequently transferred their rights over both estates to a company called the Ipoh Rubber Estate, Ld., making on the whole transaction a profit of which the share of the respondent was the sum of 603*l.* 10*s.*, hereinbefore mentioned.

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(1) [1925] 2 K. B. 753.

The material provisions of the Income Tax Act, 1918, are as follows:—

SCHEDULE D.

"1. Tax under this Schedule shall be charged in respect of—(*a*) The annual profits or gains arising or accruing—(ii.) To any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same respectively be carried on in the United Kingdom or elsewhere, (*b*) All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C, or E, and not specially exempted from tax."

"2. Tax under this Schedule shall be charged under the following Cases respectively; that is to say:—Case I. Tax in respect of any trade not contained in any other Schedule. Case VI. Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule."

"Trade" is defined as including every trade, manufacture, adventure or concern in the nature of trade.

The Commissioners being required to state a case did so on April 17, 1928, and expressed their conclusion in the following terms: "That the appellant (the present respondent) acquired the property or interest in property in question with the sole object of turning it over again at a profit, and that the appellant at no time had any intention of holding the property or interest in property as an investment," and made the assessment above mentioned.

The only finding of fact was that above stated.

On the matter coming before Rowlatt J. he made an order that the case be remitted to the Commissioners for them to find whether there was or not a concern in the nature of trade.

By the Supplementary Case stated in pursuance of the said order the Commissioners found that the transaction in question was not a concern in the nature of trade, but they did not alter the assessment.

On the Supplementary Case coming before him, Rowlatt J. discharged the assessment. The finding of the Commissioners excluded the profit in question from Case I., and in the learned judge's opinion it was a mere accretion to capital and was not an annual profit or gain under Case VI.

On appeal to the Court of Appeal, consisting of the Master of the Rolls and Lawrence and Slesser L.JJ., the appeal was dismissed on substantially the same grounds.

In this House the Crown did not dispute that the findings of the Commissioners on the issues of fact are binding, but insisted that the assessment was properly made under Case VI.

There have been a great many cases in which similar questions have arisen, but I think it is quite unnecessary to discuss them. I think it is settled that the mere fact that the profit arises in the course of one calendar year only and does not recur is not sufficient to exclude it from the category of annual profits. The nature of the profit must in each case be considered. If it arises from a trade within the definition in the Act no difficulty occurs. If it does not, I know of no better criterion than that adopted by the majority of the Court of Appeal in *Cooper* v. *Stubbs* (1) and by Lawrence L.J. in the present case. This is expressed by Atkin L.J. in *Cooper* v. *Stubbs* (1) as follows: "'Annual profit or gain' . . . . to my mind must mean something which is of the nature of revenue or income."

Here we have a case of the acquisition of an item of property and a profit made by the transfer thereof to another. In this I can find nothing but a profit arising from an accretion in value of the item of property in question and the realization of such enhanced value. There is in this nothing in the nature of revenue or income. The fact that the parties intended from the first to make a profit if they could does not in my opinion affect the question we have to determine. The case seems to me to be a clear one against

(1) [1925] 2 K. B. 753, 775.

the Crown, and I agree that the appeal fails and should be dismissed.

Lord Thankerton. My Lords, the respondent was one of a syndicate of four who in August, 1925, secured an option of purchase—apparently without any payment for the option —of a rubber estate in the Federated Malay States at the price of 26,000*l.*; their object was the promotion of a company to whom the estate should be sold at a profit to the syndicate. Finding the estate too small for their purpose, they acquired in September, 1925, an option of purchase on a neighbouring estate, again apparently without any payment, at the price of 35,000*l.* The company was thereafter formed and the options transferred to it. The result of the syndicate's operations was a nett profit, after deduction of expenses, of which the respondent's share was 603*l.* 10*s.*, which is claimed by the Crown as chargeable to income tax as being profits or gains comprised in Schedule D of the Income Tax Act, 1918, that is to say, either profits or gains from a trade, adventure or concern in the nature of trade within the category of Case I. of Schedule D or other profits or gains within the category of Case VI. of Schedule D.

The General Commissioners upheld the assessment, but their finding was inconclusive as to whether the case fell within Case I. or Case VI. of Schedule D, and Rowlatt J., before whom the respondent's appeal came, remitted the stated case to the Commissioners for them "to find whether there was or not a concern in the nature of trade." The Commissioners then made a supplementary finding as follows —namely: "The Commissioners having considered the evidence and arguments submitted as to what took place in the nature of organising the speculation, maturing the property and disposing of the property and after due consideration of the facts and arguments submitted to them find that the transaction in question was not a concern in the nature of trade."

I agree with the view taken in both the Courts below that that finding was a finding in fact which excludes the application of Case I. of Schedule D.

There remains Case VI., which brings into charge "any annual profits or gains not falling under any of the foregoing Cases and not charged by virtue of any other Schedule."

It is now settled that annual profits and gains taxable under Schedule D may be satisfied by profits falling within the year of charge and accruing during a period of less than a year: see *Martin* v. *Lowry* (1), in which the opinion of Rowlatt J. on this point in *Ryall* v. *Hoare* (2) was approved. In that case Rowlatt J. said: "The word 'annual' here can only mean 'calculated in any one year,' and 'annual profits or gains' mean 'profits or gains in any one year or in any year as the succession of years comes round.'" While this is so, the isolated nature of a transaction, as opposed to a series of transactions of the same kind, will have a material bearing not only on the question as to whether it was a "trade, adventure or concern in the nature of trade," but also as to whether the profit arising therefrom was an accretion of capital or "profits or gains" within the meaning of the Income Tax Act, which connotes the idea of revenue or income.

In the present case two options for the purchase of real estate were acquired and disposed of within two months; the estates themselves were not taken up or dealt with in any way. This was a simple case of purchase and sale, once the Commissioners had decided that the transaction was not a concern in the nature of trade. I agree with Lawrence L.J. when he says (3): "I have the greatest difficulty in seeing how an isolated transaction of this kind, if it be not an adventure in the nature of trade, can be a transaction ejusdem generis with such an adventure and therefore fall within Case VI. All the elements which would go to make such a transaction an adventure in the nature of trade, in my opinion, would be required to make it a transaction ejusdem generis with such an adventure. It seems to me that in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It

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(1) [1927] A. C. 312.

(2) [1923] 2 K. B. 447, 455.

(3) [1930] 1 K. B. 279, 301.

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is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property." I further think that the law is correctly stated by Lord Sands in his judgment in the recent Scottish case of *Inland Revenue* v. *Livingston* (1), where he says: "According to understanding, practice, and, I think, authority, ever since the income tax was introduced, it has been recognised that the profit of an isolated transaction by way of purchase and re-sale at a profit, not within the ambit or trade of the party making the profit, is not assessable to income tax as 'profits or gains arising or accruing to any person residing in the United Kingdom from any trade.'" He goes on to point out that a transaction may be treated as of the nature of trade where, although there may have been only one initial purchase, there has been a series of sub-sales of an ordinary market nature, and that, even if there is an isolated purchase and an isolated re-sale, the subject of purchase and sale may be so treated in the interval as to bring the transaction within the category of carrying on a trade. In that case a cargo steamer was purchased and converted and refitted as a steam-drifter and resold within four months at a profit, and the Court held such profit assessable under Case I. of Schedule D on the ground that the operations on the ship were in the nature of trade. That case affords a useful contrast to the present case.

The case of *Cooper* v. *Stubbs* (2) was relied on by the Crown, but that was not the case of an isolated purchase and re-sale of property. The appellant in that case was a member of a firm of cotton brokers, but, in accordance with a practice common to persons engaged in that trade, he had dealings on his own account and independently of his firm in future delivery contracts, which, at all events so far as he was concerned, were simply speculations in future differences. The assessments in question were in respect of such transactions over three income tax years, the average number of transactions per annum being about fifty. Further, the appellant had been entering into such transactions in every year from 1915 to 1922. The Commissioners held that the

(1) 1927 S. C. 251, 256.
(2) [1925] 2 K. B. 753.

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appellant did not deal in future delivery contracts so habitually and systematically as to constitute those dealings the carrying on of a trade and that the profits were therefore not assessable under Case I. They further held that the dealings were gambling transactions and were not assessable under Case VI. Rowlatt J. reversed the decision of the Commissioners, and his decision was affirmed by the Court of Appeal. Pollock M.R. held that the Commissioners had misdirected themselves and that these transactions were such as to constitute a trade adventure or concern in the nature of trade under Case I., which had been the ground of the decision of Rowlatt J. On the other hand, Warrington L.J. and Atkin L.J., held that the Commissioners' finding under Case I. raised no question of law with which the Court could deal, but that they were wrong in holding that they were wagering transactions, and held that the profits arising from them were chargeable under Case VI. Warrington L.J. says (1): "The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of para. 1 (*b*) of Schedule D. On the findings of the Commissioners themselves they were contracts entered into with a view to making a profit on a rise or fall, as the case might be, in the market price of the contracts. They extended over a considerable number of years. There were large numbers of transactions in each of those years, from which in some years the appellant derived considerable revenue; and for myself I cannot see what there is to exclude that revenue from the tax which is charged under Schedule D. It seems to me, therefore, that, in this case, whatever may be the case under different facts, at all events the profits made by these transactions are annual profits or gains, and must be assessable to income tax." In my opinion, that case also affords a contrast to the present case, where the transaction was an isolated one, for the fact that there were

(1) [1925] 2 K. B. 753, 769.

two options acquired does not appear to me to deprive the transaction of that character.

Accordingly I am of opinion that the profit here in question was in the nature of a capital accretion and was not "profits or gains" chargeable to income tax under Case VI. and I concur in the motion proposed.

Lord Macmillan. My Lords, the Commissioners, having had their attention specially directed to the point by a remit from Rowlatt J., have found that "the transaction in question was not a concern in the nature of trade." The learned Attorney-General submitted that in strict logic this finding did not exhaustively exclude from Case I. of Schedule D the profits or gains arising from the transaction, inasmuch as under Case I. tax is chargeable in respect of any trade not contained in any other Schedule and "trade" by s. 237 of the Income Tax Act, 1918, "includes every trade, manufacture, adventure or concern in the nature of trade." Therefore, he argued, a finding that the transaction was not "a concern in the nature of trade" still left it open to him to maintain that it was an "adventure." But the Commissioners have not found that it was an "adventure." On the contrary, inasmuch as an "adventure" in this context must plainly be a trading adventure, their general finding that the transaction was "not a concern in the nature of trade" is sufficient to negative the suggestion that it was a trading adventure.

The transaction being thus excluded from charge under Case I., it was maintained that it fell within Case VI., which subjects to tax any annual profits or gains not falling under any of the preceding Cases and not charged by virtue of any other Schedule. The difficulty which here confronts the Crown is that the profit made by the respondent was the result of an isolated transaction of sale but not of a transaction of sale by way of trade and it is not easy to see how the profit on an isolated sale which is not a trading transaction can be other than a capital accretion and so outside the category of annual profits or gains. The case of *Cooper* v. *Stubbs* (1), on which the Attorney-General relied, differs widely in its facts from the present case. The Court was there dealing with the profits of transactions in cotton "futures" extending over a considerable number of years, and involving numerous transactions in each year but which the Commissioners had found not to be profits resulting from the carrying on of a trade. As both Warrington and Atkin L.JJ. (as they then were) pointed out, the profits made were plainly "annual profits or gains." Consequently if they were not otherwise charged they necessarily fell under Case VI.

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(1) [1925] 2 K. B. 753.

I am content to hold that the profits of the particular transaction here in question were not annual profits or gains within the meaning of Case VI. The result is that in my opinion the appeal of the Crown fails and should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, March 18, 1930.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitors for the respondent: *Wansey, Stammers & Co., for D. & D. Carruthers, Kilmarnock.*

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1930
April 4.

[HOUSE OF LORDS.]

FRY . . . . APPELLANT;

AND

SALISBURY HOUSE ESTATE, LIMITED RESPONDENTS.

JONES . . . . APPELLANT;

AND

CITY OF LONDON REAL PROPERTY COMPANY, LIMITED . . . . . RESPONDENTS.

Revenue—Income Tax—Letting of Offices—Assessment on Land—Cleaning and heating Services supplied by Landlord—Trade carried on by Landlord—Assessment in respect of Profits of Trade—Claim to include Rents in Assessment in respect of Trade making an Allowance for Tax paid on Land—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 1; *Schedule A, No. VII., r.* 4; *Schedule D, Case I.*

A company formed to acquire, manage and deal with a block of buildings let out the rooms as unfurnished offices to tenants. The company provided a staff to operate the lifts and to act as porters and watch and protect the building. The company also provided certain services—such as heating and cleaning—for the tenants if required, at an additional charge.

For each of the four years ending April 5, 1925, 1926, 1927 and 1928 the company was assessed under Schedule A to income tax on the gross value of the building as appearing in the valuation list under the Valuation (Metropolis) Act, 1869. The company admitted its liability to be assessed in respect of its profits from the services supplied to the tenants under Schedule D, but the Crown claimed in making the assessments under Schedule D to include the rents of the offices as part of the receipts of the trade, making allowance for tax assessed under Schedule A:—

Held, that the rents were profits arising from the ownership of land in respect of which the assessment under Schedule A was exhaustive, and that they therefore could not be included in the assessment under Schedule D as trade receipts of the company.

Rosyth Building and Estates Co. v. *Rogers* 1921 S. C. 372; 8 Tax Cas. 11, so far as it decides that as between Schedule A and the other Schedules the Crown has an option to select under which Schedule it will tax, overruled.

Coman v. *Governors of Rotunda Hospital, Dublin* [1921] 1 A. C. 1 distinguished.

Decision of the Court of Appeal [1930] 1 K. B. 304 affirmed.

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* *Present:* VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD TOMLIN, and LORD MACMILLAN.

FRY *v.* SALISBURY HOUSE ESTATE, LIMITED.

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APPEAL from an order of the Court of Appeal (1) reversing an order of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The Case is set out in the report before the Court of Appeal and the facts are summarized in the headnote.

The sole question for the opinion of the Court was whether the rents received by the respondent company on letting the offices in Salisbury House were properly to be included in the assessments under appeal as trade receipts of the company for purposes of Case I. of Schedule D of the Income Tax Act, 1918.

The Commissioners, in deference to the opinions expressed by the Court of Session in *Rosyth Building and Estates Co.* v. *Rogers* (2) decided that the rents were rightly included in the assessments under Schedule D.

Rowlatt J. affirmed the determination of the Special Commissioners, but the Court of Appeal (Lord Hanworth M.R., Lawrence and Slesser L.JJ.) reversed his decision.

1930. March 3, 6, 7. *Sir William Jowitt A.-G.* and *Reginald Hills* for the appellant. The first question is whether the respondents are carrying on a trade within the meaning of Case I. of Schedule D. In determining whether a trade is being carried on the Courts have drawn a distinction between an individual and a company, and the fact that the respondents are a company formed for the express purpose of managing and turning to account for profit the offices and flats of which this block of buildings is composed is an element to be considered: *Inland Revenue Commissioners* v. *Korean Syndicate* (3); *Inland Revenue Commissioners* v. *Westleigh Estates Co.* (4); *South Behar Ry. Co.* v. *Inland Revenue Commissioners* (5); *Smith* v. *Anderson.* (6) Sir George Jessel's judgment in the last-mentioned case was

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(1) [1930] 1 K. B. 304.
(2) 1921 S. C. 372.
(3) [1921] 3 K. B. 258, 273.
(4) [1924] 1 K. B. 390, 417.
(5) [1925] A. C. 476, 485.
(6) (1880) 15 Ch. D. 247, 260.

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reversed on appeal, but his dictum on this point is not affected. In so managing and turning to account this property it can hardly be contested that the respondents are carrying on a trade, adventure or concern in the nature of trade, both in the ordinary commercial sense and for income tax purposes. The rents received from the tenants are an essential ingredient of the trade receipts, as appears from the profit and loss accounts, and must be included in arriving at the full amount of the balance of the profits and gains as directed by the General Rule of Case I. The respondents' business is one business, and cannot be split up into the letting of the offices and the rendering of services to the tenants, such as cleaning and firing: see *Liverpool and London and Globe Insurance Co.* v. *Bennett.* (1) The next question is: Assuming that the respondents are carrying on a trade, is there anything in Schedule A which takes this case out of Schedule D? It is submitted not. This trade is not within the category of trades excepted by r. 3 of the Rules of No. III. of Schedule A. The property tax under Schedule A is not in respect of rents, but in respect of annual value, and has nothing to do with the profits of a trade, which are chargeable under Schedule D. The facts of this case differentiate it from the case of an ordinary landowner: *Rosyth Building and Estates Co.* v. *Rogers* (2); *Coman* v. *Governors of Rotunda Hospital, Dublin* (3); *Smith* v. *Lion Brewery Co.* (4); *Usher's Wiltshire Brewery Co.* v. *Bruce.* (5) In the last-mentioned case Lord Sumner ridicules the argument that if a trader happens to be a landlord his liability to income tax, so far as his houses are concerned, is to be exclusively dealt with under Schedule A, as though Schedule D did not exist. *Back* v. *Daniels* (6) is not opposed to the appellant's contention. It assumes that the potato merchant might have been charged under Schedule D but for the special provisions in the Act as to husbandry. Inasmuch as the respondents had already been charged to income tax as landlords in the manner provided by r. 8 (*c*) of No. VII. of Schedule A upon the gross value as appearing in the valuation list, in accordance with the Valuation (Metropolis) Act, 1869, the inspector of taxes, in the assessments now complained of, proceeded on the principle of including all the rents and other receipts derived from the management of the property and of deducting therefrom not only the expenses of management, but also the amount of the assessment made upon the respondents under Schedule A. It is for the Crown to choose in which capacity the company shall be charged—as property or investment owner on the one hand or as trader conducting a business on the other: *Rosyth Building and Estates Co.* v. *Rogers*. (1) It is well settled that if a subject is liable to be taxed under either of two Cases the Crown has an option to tax under which it pleases: *Liverpool and London and Globe Insurance Co.* v. *Bennett* (2), where the authorities on this subject are collected, and there is no foundation for drawing any distinction for this purpose between Cases and Schedules. Strictly speaking, the Crown is not here exercising an option. The taxpayer must be assessed both under Schedule A and under Schedule D, but the tax will not be demanded from him under both Schedules on the principle of avoiding double taxation. Effect will be given to this principle in order to relieve the taxpayer from an obvious injustice, notwithstanding that the Act contains no express provision on the point: *Inland Revenue Commissioners* v. *Roberts*. (3)

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(1) [1911] 2 K. B. 577, 589; [1913] A. C. 610, 616, 617.

(2) 1921 S. C. 372.

(3) [1921] 1 A. C. 1.

(4) [1911] A. C. 150.

(5) [1915] A. C. 433, 470.

(6) [1925] 1 K. B. 526.

Latter K.C. and *Cyril King* for the respondents. The rents of the offices were receipts arising from the ownership of land, and are therefore chargeable under Schedule A and under no other Schedule. Income tax is a tax on income and is one tax. There is no difference in kind between duties assessed under Schedule D and Schedule A or any other Schedule. The expression "profits and gains" is not confined to Schedule D, but applies to all the Schedules. Each Schedule is separate and complete in itself, and has

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(1) 1921 S. C. 372.

(2) [1911] 2 K. B. 577, 591.

(3) (1925) 9 Tax Cas. 603, 622, 623, 625.

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assigned to it its appropriate set of profits, and each provides an exclusive measure of income. If a case falls within one Schedule it cannot fall within another: *London County Council* v. *Attorney-General* (1); *Coltness Iron Co.* v. *Black* (2); *Humber Conservancy Board* v. *Bater* (3); *Inland Revenue Commissioners* v. *Forth Conservancy Board.* (4) Schedule A deals exhaustively with profits and gains arising from the ownership of lands, and says that the measure is the annual value. When once it is conceded that in this case there must be an assessment under Schedule A there can be no question of option. *Rosyth Building and Estates Co.* v. *Rogers* (5) therefore has no application. But so far as that case decides that the crown may have an option to choose between different Schedules it is inconsistent with the principles laid down by this House. Land owning is not a trade; it is not a question of degree: *Inland Revenue Commissioners* v. *Sangster* (6); and see *Back* v. *Daniels.* (7) *Coman* v. *Governors of Rotunda Hospital, Dublin* (8), is distinguishable. There the respondents were held liable to tax under Schedule D for the profits of letting out rooms with their fixtures and furniture for entertainments, the reason for that decision being that the transaction was not such as to constitute the relation of landlord and tenant between the parties. In this case the Commissioners, while professing to act on the principle of avoiding double taxation, are in fact bringing in the same source of income twice and are claiming to deduct the lower measure of tax. There is no authority in the Act for their procedure. Whether there is any implied rule of law against double taxation has been doubted by Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co.* (9)

Reginald Hills replied.

The House took time for consideration.

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(1) [1901] A. C. 26, 36, 45.
(2) (1881) 6 App. Cas. 315, 336.
(3) [1914] 3 K. B. 449, 457.
(4) [1929] A. C. 213, 220.
(5) 1921 S. C. 372.
(6) [1920] 1 K. B. 587, 597.
(7) [1924] 2 K. B. 432, 447; [1925] 1 K. B. 526, 536, 539, 543.
(8) [1921] 1 A. C. 1.
(9) [1923] A. C. 744, 772.

JONES v. CITY OF LONDON REAL PROPERTY COMPANY, LIMITED.

Appeal from an order of the Court of Appeal (Lord Hanworth M.R., Lawrence and Slesser L.JJ.) allowing an appeal of the respondents from part of an order of Rowlatt J. and dismissing a cross-appeal by the appellant from another part of the order. The order of Rowlatt J. substantially affirmed the decision of the Commissioners for the Special Purposes of the Income Tax Acts, but amended it as to part.

The facts of the case were indistinguishable from the facts of the previous case.

1930. March 7. *Sir William Jowitt A.-G.* and *Reginald Hills* for the appellant.

Wilfrid Greene K.C. and *Raymond Needham K.C.* (with them *A. M. Bremner*) for the respondents.

The House took time for consideration.

1930. April 4. VISCOUNT DUNEDIN. My Lords, this is an important case with probably far-reaching consequences, and we had the benefit of a very full and able argument from the Attorney-General on behalf of the Crown, but in the end I have come to the conclusion, though not without difficulty, that the judgment appealed from is right and should be affirmed. The facts which give rise to the question are as follows :—

Salisbury House is a building of considerable size in the City of London and is owned by a limited company, which was formed for the express purpose of acquiring the property known as Salisbury House, and utilizing it. The house contains about 800 rooms. These rooms are let to tenants as offices. There is no residential occupation. No furnishings are provided. The company maintain a staff of servants to operate the lifts and act as porters and look after the building, and there is also a large staff of cleaners all under the orders of a housekeeper paid by the company. The tenants have the exclusive use of the rooms let, but are bound to leave the keys at night with the housekeeper so as to allow access in the case of fire breaking out. The company retain certain rooms as an office. By the terms of the leases the company have to pay all rates and taxes. The company were assessed to income tax under Schedule A upon the gross value of the premises as appearing in the valuation roll in accordance with the Valuation (Metropolis) Act, 1869. This assessment was imposed on the company as landlords, instead of on the various individual tenants who are the occupiers, in accordance with r. 8 (*c*) (i.) of Schedule A, No. VII., of the Income Tax Act, 1918, which provides for the assessment of landlords instead of tenants in the case of any house or building let in different apartments or tenements, and occupied by different persons severally, and the amount of the assessment was duly paid by the company. The inspector of taxes then served on the company a notice of assessment under Schedule D. He arrived at the assessment by calculating the amount of profit as brought out in the profit and loss account of the company, after deducting expenses of management and upkeep, and then he proposed to deduct from the assessment so brought out the amount of assessment already paid under Schedule A. The company admitted that they had to pay under Schedule D upon the amount of profits which they made from the cleaning and other services, but contended that, so far as the proceeds of the property were concerned, that had already been taxed under Schedule A and could not again be brought in computo under Schedule D and demanded a case. A case was stated by the Commissioners, which sets out the above facts. The figures, apart from the question of principle, have been agreed on.

Rowlatt J. took the view that the Commissioners had decided the case rightly and dismissed the appeal. He thought the case was ruled by the judgment of the Court of Session, given in the case of *Rosyth Building and Estates Co.* v. *Rogers*. (1) The appeal being taken to the Court of Appeal, that Court unanimously reversed the judgment, and the Crown now appeals to your Lordships.

(1) 1921 S. C. 372.

My Lords, this is one of those cases which may be approached, so to speak, from very different angles, and according as you approach it from one angle or another a different conclusion may seem to be the one that is right to follow. I can only say that, after the best consideration I could give it, my opinion is that the angle from which I now approach it is the right one. Now, the cardinal consideration in my judgment is that the income tax is only one tax, a tax on the income of the person whom it is sought to assess, and that the different Schedules are the modes in which the statute directs this to be levied. In other words, there are not five taxes which you might call income tax A, B, C, D and E, but only one tax. That tax is to be levied on the income of the individual whom it is proposed to assess, but then you have to consider the nature, the constituent parts, of his income to see which Schedule you are to apply. Now, if the income of the assessee consists in part of real property you are, under the statute, bound to apply Schedule A. Schedule A may, so to speak, get in touch with the assessee in different ways according to the condition of affairs. It may touch property in occupation which actually brings in no money return. A good example will be found in the case decided within the last few weeks in this House in the case of Lady Miller: *Inland Revenue Commissioners* v. *Miller*. (1) There a lady enjoyed the use of a mansion house under the provisions of the will of her deceased husband, which was feudally vested in trustees. The mansion house brought her in no money, but she was reckoned as for income tax in order to arrive at super-tax on the yearly value of the house. In this matter it differs from all the other Schedules, all of which only deal with actual return. When, as in the present case, a subject is let, the rent, if it represents a fair bargain, is taken as the measure of that part of the income of the lessor, and he suffers the tax by way of deduction by his tenant from the rent due or as in the present case by paying it himself. The result is that by the operation of the assessment under Schedule A, which is made imperative by the statute, and was in fact applied here, the income of the assessee is so far dealt with and cannot be dealt with again. Of course that does not mean that the assessee may not be liable in respect of other income under other Schedules. He might be liable under Schedule B, which says in terms that the amount there is to be in addition to the assessment made under Schedule A, though the underlying subject is the same. But he might be liable under any of the other Schedules if he has income to which they apply, and in particular he might be liable under Schedule D. It is a mere commonplace to remark that a man who possesses real property and is assessed under Schedule A, may also have investments and other forms of property which will be assessed under Schedule D.

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(1) Ante, p. 222.

Now, turning to this case. The income of the respondents, as represented by rents, is admittedly assessed and properly assessed under Schedule A. "But then," says the appellant, "you are carrying on a business, and a business falls to be assessed under Schedule D." To which the respondent replies, "Quite so; and I am willing to pay on the profits which I make on the cleaning and other services." To this the appellant replies, "No; that is not enough. Your business is one business not a congeries of businesses, and if I estimate your profits from your own profit and loss account, I will get the higher figure which I ask." The answer to that is: "You cannot bring out that balance of profit without taking the rents I receive in computo. Now, these rents are also part of my income or property, and the statute says that any income which represents the value of real property is to be assessed in the manner directed under Schedule A." My Lords, I think the final answer is good. The rents, having been assessed under Schedule A, are, so to speak, exhausted as a source of income, and the so-called concession made by the appellant that there should not be double taxation, and that therefore he would be willing to allow deduction of the sum paid under Schedule A, is a concession which is beside the mark. It is a concession to avoid double taxation, but the concession cannot come into being where double taxation does not exist, and here it does not exist because, it being imperative to deal with the rents under Schedule A, there is no possibility of subsequently dealing with them under Schedule D.

My Lords, I have preferred to consider this question on the statute alone, without reference to authority, but I am far from anxious to put my judgment on a mere ipse dixi, and I will therefore analyse my own argument to see if it is supported by authority. Now, the cardinal proposition is that income tax is one tax, and the Schedules merely the different means of collecting it, and that there are not so many taxes as there are Schedules. This point was raised in the most distinct manner in the case of the *London County Council* v. *Attorney-General.* (1) I quote from the argument of the taxpayer: "There is no ground for the distinction made by the Court of Appeal between Schedule A and Schedule D. There is only one tax, and the Schedules constitute not separate imposts, but one tax under several heads." And now I quote from the language of the counsel for the Crown: "It is not correct to say that there is one tax only, the income tax. The Act of 1842 speaks in the preamble of 'the several rates and duties mentioned in the several Schedules contained in this Act and marked respectively A, B, C, D and E.' The separation is maintained throughout that Act. . . . . There are thus five different taxes." This view of the case had been upheld by the Court of Appeal, but it was rejected by this House. Lord Macnaghten, who delivered the leading judgment, says among other things: "It [income tax] is one tax, not a collection of taxes essentially distinct . . . . . In every case the tax is a tax on income, whatever may be the standard by which the income is measured. The expression 'profits or gains' . . . . is constantly applied without distinction to the subjects of charge under all the schedules." And then, commenting on the Court of Appeal's judgment, he quotes from it: "The tax under Schedule D is a tax upon 'gains and profits,' an entirely different tax from the tax under Schedule A," on which he says, "With all deference, I

(1) [1901] A. C. 26, 30, 35, 37.

do not think that that is a sound view of the Income Tax Acts." The other members of your Lordships' House agreed with him.

The next proposition is that when income is dealt with in the proper Schedule the same income cannot be dealt with again under another Schedule. There is no stronger foundation for this proposition than may be found in the fact of the option given not to the Crown but to the taxpayer who is assessed under Schedule B to be assessed under Schedule D. This obviously points to the fact that, once assigned to its appropriate Schedule, the same income cannot be attributed to another Schedule. The same may be gathered from various decisions. There are the general words of Hamilton J., as he then was, in *Hill* v. *Gregory* (1), quoted in this case by the Master of the Rolls: "The very terms which define the subject-matter of Schedule D exclude from it the subject-matters which fall within Schedule A." Then there is the case of *Back* v. *Daniels*. (2) Daniels were wholesale potato merchants and were assessed under Schedule D for the profits of the business. Part of the said profits consisted of profits made by the sale of potatoes on lands held by them under special agreements with the farmers who were in possession of the lands. It was held that the profits from these sales fell to be reckoned in the question of a Schedule B assessment in respect of the lands under the agreements, and could not be included in the amounts under Schedule D. Scrutton L.J. put the matter thus: "When there is a separate and distinct operation unconnected with the occupation of the land, such as a cheese factory dealing with the milk of a dairy farm, or a butcher's shop dealing with the beasts of a cattle farm, I can understand a separate assessment of that operation; but I do not think that the fact that the farmer sells his produce either on the farm or at the local market, or at Mark Lane, or even if he sells it in a shop, justifies an assessment under Schedule D as well as or in substitution for Schedule B."

In this connection it would be desirable to deal with the *Rotunda* case. (3) This case had the peculiarity of being

(1) [1912] 2 K. B. 61, 70.

(2) [1925] 1 K. B. 526, 544.

(3) [1921] 1 A. C. 1.

claimed by learned counsel on both sides as authority. The facts were these. The Rotunda Hospital in Dublin was a charity, and it owned buildings. Part of the buildings which was not actually used as a hospital was permitted to be used on occasions by various persons for entertainment purposes in return for a money payment. Now, the exemption from tax in respect of charitable institutions is different under Schedule A and Schedule D. It therefore became necessary, as Lord Birkenhead pointed out, to analyze the particular income in question to see whether it fell within Schedule A or Schedule D. But the rooms were not let to any one. There was no question of including the rents of the rooms in the profits which were calculated under Schedule D; the hospital was held to be in occupation of the whole premises. What was done in that case was this: the total profits made out of the fees paid were calculated under Schedule D, and then the calculated assessable value of the premises under Schedule A was deducted. (There had been no actual assessment made under Schedule A, because it had been assumed that the premises were occupied by a charity.) This was done because there was in the Irish Act a rule corresponding to r. 5 in Cases I. and II. of Schedule D of the 1918 Act, which exempts from taxation under Schedule D the profits or gains arising from annual value of the premises occupied for the purposes of the business.

Now, that was a perfectly different operation from what is proposed here. If that case had been treated as the crown wish to treat this one, the assessable value of the premises ought to have been added to the receipts in making up the trade profits, and then from the tax so brought out, not the value of the premises, but the tax calculated as under Schedule A in the premises, ought to have been deducted.

To resume the general argument in favour of the distinction between the Schedules. There is the phraseology of s. 208: "The provisions in this Act contained which are applied to the tax under any particular Schedule shall, if also applicable to the tax under any other Schedule and not repugnant to the provisions for ascertaining, charging or levying the tax

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under such other Schedule, be applied in ascertaining, charging and levying tax under that Schedule, as if the application of those provisions thereto had been expressly and particularly directed," which points very clearly to the different Schedules being distinctly applicable to only one class of property. Now, it is obvious that, although land must be assessed under Schedule A, there may be activities connected with the land which will fall under another Schedule. Schedule B gives the simplest example, but then there are also activities which fall under Schedule D. It would be rash indeed for any one to say that he had in his mind all the cases decided in regard to the Income Tax Acts, but at any rate no case was produced by crown counsel here, in which in computing profits under Schedule D the rents of lands, which had been let, and were not in the occupation of the assessee under Schedule D, were taken in computo. It is therefore of no use to cite cases of which the Silloth Golf Club case (*Carlisle and Silloth Golf Club* v. *Smith* (1)), is an instance, where profits arising from the use of land were taxed under Schedule D, but where the assessee was not the person liable under Schedule A in respect of those lands. There are dicta against doing so. Lord Loreburn in *Smith* v. *Lion Brewery Co.* (2) said: "You cannot, by saying that a man carries on the business of owning house property, shift the method of assessing that property for income tax from Schedule A to Schedule D." It is true that Lord Loreburn was there delivering a dissenting judgment, but the point on which he differed—namely, the question of the right to a deduction in assessing the profits under Schedule D—does not affect the dictum above quoted. In this very case Rowlatt J. states the law generally to this effect: "Real property is always liable to Schedule A and under no circumstances can you take it out of Schedule A—discard Schedule A—and throw it into a Schedule D account and treat it under Schedule D." I confess I cannot reconcile this with his judgment except upon the view that he considered himself bound by the *Rosyth* case. (3) There is a very

(1) [1913] 3 K. B. 75.
(2) [1911] A. C. 150, 155.
(3) 1921 S. C. 372.

instructive passage in the judgment of Lord M'Laren in a Scotch case: *Edinburgh Southern Cemetery Co.* v. *Surveyor of Taxes.* (1) That was a case of a cemetery company which rented a piece of land which they utilized as a cemetery by selling lairs to persons to be used for burial purposes and to belong to them in perpetuity. The actual decision was that this was a concern of the like nature to the enumerated properties in rule 3 of Schedule A, No. III., of the Act of 1842, and so fell to be assessed under that Schedule in the way there stated. Lord M'Laren seems almost to anticipate the present case. He says: "It is certainly not sufficient to bring a particular use of land within the scope of rule 3 that the proprietor of the land is using it in connection with his trade or for purposes of trade; because in such cases it is generally possible to separate the income into two parts, the one representing the rent or annual value of the heritable property, and the other representing the commercial profit. Where this can be done, the proper mode of assessing seems to me to be to assess under Schedule A in respect of annual value, and also under Schedule D for the commercial profits of the business or manufacture carried on within the heritable subjects."

I now come to the case which is undoubtedly to the opposite effect, the *Rosyth* case. (2) That case does not contradict my general assertion as to no case having been produced in which the Crown had done what they here propose to do. But notionally for the purpose of deciding as to repayment of part of an assessment it was done, and it is a direct authority in point. The Master of the Rolls and the other judges of the Court of Appeal were I think affected with too great politeness to the Court of Session and dealt with this case by saying it was a Scotch case, and they could not quite understand it. There is no question of Scotch as discriminated from English law involved in it, but in any case I am afraid I could not shield myself under the same excuse. I say directly it was wrong. Nor do I think it is at all difficult to see why it was wrong; and it is just here I touch what I have always felt to be the difficulty in this case. The

(1) (1889) 17 R. 154, 165.

(2) 1921 S. C. 372.

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company there had duly been assessed under Schedule A, but the point was, might it have been assessed under Schedule D instead of under Schedule A? The Lord President says (1): "It is settled that it is for the Crown to choose in which capacity the company shall be charged—as property or investment owner on the one hand or as trader conducting a business on the other." "The house property in this case is not occupied for the purposes of the company's business; it is occupied by tenants to whom the company lets it. Accordingly, I think the Crown is alternatively entitled to treat the rents either as chargeable in respect of the company's property under Schedule A, or as constituents of the profits arising or accruing to the company from its business chargeable under Schedule D." Now that that settles the point I do not think can be doubted. But when one comes to look at the cases which were cited, and on the effect of which the Lord President says, "it is settled, etc.," it will be found that they are all cases, not of choice between Schedule and Schedule, but between the various Cases in Schedule D. It had been settled long ago that in the case of insurance companies who held large investments the Crown might proceed to reckon under either Case I. in Schedule D or under any of the other Cases which may be found to apply. I myself said it in the case of *Revell* v. *Edinburgh Life Insurance Co.* (2), and what I said was approved and adopted by Cozens-Hardy M.R. in *Liverpool and London and Globe Insurance Co.* v. *Bennett.* (3) From this the Lord President has, without authority, deduced the view that as there is an option between Cases so there must be an option between Schedules, and he bases this in argument on the possibility of an insurance company having securities which would fall under Schedule C and others falling under Schedule D. My Lords, I confess this has been the difficult part of the case to me. It is very obvious to suggest that if the Crown can opt as between Cases why should it not opt as between Schedules, and that the company is carrying on a business I

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(1) 1921 S. C. 377, 380.
(2) (1906) 5 Tax Cas. 221, 226.
(3) [1912] 2 K. B. 41, 51.

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do not doubt. The memorandum of association shows that it is. But I think the answer is that an option between Cases does not in any way disturb the general scheme of the Act, an option between Schedules would. I think on a general survey of the history and policy of the Income Tax Acts one finds the great distinction that there is between Schedules A and B on the one hand and the other three Schedules on the other. I think it would upset the whole scheme of taxation if you were in the case of real property to be allowed to ignore Schedules A and B. There is no conflict between Schedules C and D if, as is the hypothesis put by the Lord President, the Crown elects to charge in Schedule D on Cases other than Case I. Schedule C is not so to speak upset. On the contrary the charge on the particular form of investment under Schedule C fits in with the charge on other investments made under say Case III. of Schedule D. But in the case of real property if you do what is here asked Schedule A is upset altogether. With great respect to the learned judges in the Court of Session I think it was only Lord Skerrington who saw that by a side wind they were asked to introduce a great novelty. Lord Skerrington says (1): "The Inland Revenue do not seek to assess the appellant company according to the rules under the First Case in Schedule D, but it is essential to their success in this litigation to demonstrate that they would have been entitled to make such an assessment if they had so wished. . . . . I should have listened to the argument with more satisfaction if, at the outset, we had been informed that a company in the position of the appellant company had never, so far as known, been assessed according to the rules under the First Case in Schedule D, and if we had been invited to attend to the provisions of the Income Tax Acts for the purpose of considering whether there was any good reason why such an assessment should not now be imposed for the first time." I think this shows that the immense importance of the case had not been before the Court, and that no argument as to the imperative character of Schedule A as to real property had been presented.

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(1) 1921 S. C. 372, 381.

As I have said, I recognize the case to be full of difficulty, but on the whole I have come to the conclusion that the decision of the Court of Appeal is right. What are known as the Brewery cases (*Smith and Lion Brewery Co.* (1) and *Usher's Wiltshire Brewery Co.* v. *Bruce* (2)) have I think no application to the question in hand. I move that the appeal be dismissed with costs.

As regards the other case that is called on, it absolutely follows this, and, of course, the judgment in the first case rules the judgment in the second.

LORD WARRINGTON OF CLYFFE (read by LORD MACMILLAN). My Lords, the respondents are a company incorporated under the Companies Acts. They are the owners of a large building in the City of London known as Salisbury House. This building contains some 800 rooms, which have been let by the company to some 200 tenants as offices singly or in suites at rents varying according to the accommodation provided, the situation of the several rooms and so forth. The company provides a staff of porters and cleaners, who perform certain services for the tenants, for which additional rents and charges are made by the company.

The question in this appeal is whether the company in thus letting the premises owned by it is carrying on a trade within the meaning of the Rule applicable to Case I. of Schedule D of the Income Tax Act, 1918, and is therefore liable to be charged under that Schedule in respect of the gains and profits of that trade, the Crown contending that in that case they would be liable to bring into account as part of their gross receipts the amount of the rents received by them from the tenants of the several rooms and offices so let by them as hereinbefore mentioned.

The company is already charged as landlord under r. 8 of the Rules applicable to Schedule A, No. VII., in respect of the annual value of Salisbury House as appearing in the valuation list under the Valuation (Metropolis) Act, 1869, which is by that Act made conclusive for the purposes of

(1) [1911] A. C. 150.

(2) [1915] A. C. 433.

income tax in the case of hereditaments within the Administrative County of London. This annual value is considerably less than the amount of the rents payable by the several tenants. The Crown admits that if the company were charged under Schedule D in respect of the gross amount of rents received as well as under Schedule A in respect of the annual value it would be taxed twice over in respect of the same subject-matter, and concedes that if they are right in their contention that the company should be assessed under Schedule D, the amount of the assessment under Schedule A must be deducted from the total receipts of the company including rents less expenses.

The company on the other hand admits that it is liable to be assessed under Schedule D upon any profit which it derives from tenants outside the rents themselves, so far as such profits may be described as resulting from a trade, but insists that on a landowner letting the hereditaments of which it is owner it is not carrying on a trade, and is liable only to be assessed under Schedule A in respect of the annual value of the hereditaments.

The company having been assessed in accordance with the contentions of the Crown for the four years ended April 5, 1928, appealed to the Commmissioners, who confirmed the assessments. They were required to state a Case. By that case they stated in full detail the facts summarized above and concluded that they were bound by authority to decide that the assessments under Schedule D were rightly made to include the amounts by which the total receipts of the company (including its rents from offices) less expenses exceeded the Schedule A assessments. They further state that the sole question upon which the opinion of the Court is desired is whether the rents received by the company on letting the offices in Salisbury House are properly to be included in the assessment as trade receipts of the company for purposes of Case I. of Schedule D of the Income Tax Act, 1918.

The Case came before Rowlatt J., who confirmed the view of the Commissioners, but on appeal to the Court of Appeal his order was reversed and the Case was remitted to the

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Commissioners to amend the assessments. The Crown appeals to this House.

It is well settled that though the tax under Schedule A is a tax on income like that under all the other Schedules it is not a tax upon rents. It is assessed upon annual value which in the present case is fixed by the valuation list above referred to. The latest case on this subject is *Miller's* case (1) before this House, in which it was held that a person in actual enjoyment of and occupying lands is liable to the tax, although he is not in receipt of rent therefrom nor even, by reason of the nature of his tenure, capable of converting his enjoyment into rent. Now the effect of the Crown's contention if it be correct would be indirectly to convert this tax on annual value to a tax on rents, and therefore it seems to me that a heavy burden is cast upon the Crown before its contention can succeed.

The first question to be determined is whether in its capacity as landowner deriving rents from its land the company is carrying on a trade within the meaning of Schedule D and the rules thereunder, and if this question is answered in the negative the further questions raised and argued in this House do not arise.

Now in the first place the Commissioners have not in my judgment decided this question as one of fact, and it is therefore open to the House now to express their own views thereon. The Commissioners have contented themselves with stating the facts as to the mode in which the company deals with the property of which it is the owner, and then express the opinion that the assessments under Schedule D were rightly made to include the amounts by which the total receipts of the company, including rents from offices less expenses exceeded the Schedule A assessments, and state that the sole question is whether the rents are properly included as trade receipts. That is to say whether, assuming the company is liable to be assessed under Schedule D as a trader the rents are properly included in the gross receipts.

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(1) Ante, p. 222.

There is nothing in the facts stated in the case which would properly lead to the conclusion that in dealing with the property the company is acting otherwise than an ordinary landowner would act in turning to profitable account the land of which he is the owner. It would in my opinion be impossible to hold that in such a case the landowner is carrying on a trade. Such a person would I think clearly be assessable under Schedule A only, and his taxable income would be measured by the conventional annual value and not by the amounts of the rents he actually received.

But the Crown contends that the fact that the taxpayer is a limited company may distinguish its operations from those of an individual. Assuming the memorandum of association allows it, and in this case it unquestionably does, a company is just as capable as an individual of being a landowner and as such deriving rents and profits from its land, without thereby becoming a trader, and in my opinion it is the nature of its operations, and not its own capacity, which must determine whether it is carrying on a trade or not. Nor do I see any reason why, as in the present case, some of its operations under the wide powers conferred by the memorandum should not be operations of trade, whereas others are not.

Many cases have been cited in argument, but they do not in my opinion touch the present point. That which comes nearest is I think the *Rosyth Co.'s* case (1), but when that case is examined it will be found that the fact that the company was carrying on a trade was assumed as common ground. The Lord President in his judgment says: "It may sometimes be difficult to draw the line between landownership and commercial enterprise in land; but that is a question of fact of a kind which is not infrequently met with under the Income Tax Acts, and it is solved in the present case in favour of the Crown, because it is common ground that the appellant company is a land investment concern." In this case the point is open.

The Brewery cases seem to me not to be in point. The last one, *Usher's Wiltshire Brewery Co.* v. *Bruce* (1), is, if it be relevant at all, in the respondents' favour, for, though the taxpayer there was a company trading as a brewery company the rents received from its tied houses were not regarded as receipts from the brewery business except only to this extent, that inasmuch as the company was claiming as a deduction from gross receipts sums expended in repairs to tied houses it could only make good its claim to deduct the net sum so expended and therefore must allow against the cost of repairs such sums as were received by way of rent from the houses repaired.

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(1) 1921 S. C. 372, 379.

I come then to the conclusion that the Crown fails to make good the ground on which its claim to have a right to assess the company under Schedule D is based, except of course to the limited extent to which it is admitted, and that the question asked by the Commissioners was properly answered in the negative by the Court of Appeal.

For the reason given above I express no opinion upon the further points raised in argument, and in particular upon the correctness or otherwise of the decision in the *Rosyth Co.'s* case (2) or of the views expressed by the learned judges in that case, but in saying this I must not be taken to dissent from the views expressed by my noble and learned friend on the Woolsack whose opinion I have read.

The appeal in my opinion fails, and should be dismissed with costs.

It is admitted that there is no distinction favourable to the Crown between this case and that of the City of London Real Property Company, and the appeal in that case also should be dismissed with costs.

LORD ATKIN (read by LORD TOMLIN). My Lords, the respondents are a limited company who own hereditaments in the City of London consisting of a large building known as Salisbury House, which they let out to tenants as unfurnished offices. They have been assessed to income tax in respect of property in the hereditaments upon the annual value thereof under Schedule A. The assessment and charge have been made upon the owners direct under the provisions of Schedule A, No. VII., r. 8 (*c*), relating to any house or building let in different apartments or tenements and occupied by two or more persons severally. They have also been assessed under Schedule D in respect of the profits or gains of the trade said to be carried on by them in letting the offices and providing services for the tenants. The assessments under Schedule D are made upon the footing of including in the gross receipts of the trade the actual rents received from the tenants and deducting the cost of earning them. It is admitted that if the respondents are taxed upon their full profits and gains on this footing they would be doubly taxed to income tax in so far as the annual value under Schedule A represents rents received. From the gross receipts therefore is also deducted the annual value upon which the respondents have already paid income tax under Schedule A. By this adjustment they are assessed under Schedule D upon so much of the profits and gains received from rents as exceeds the annual value of property assessed under Schedule A. The respondents admit that they are liable to assessment under Schedule D in respect of the profits they make for services rendered to tenants, which appear to consist of cleaning offices and providing fuel. They contend, however, that in respect of the profits and gains they make from letting the offices the assessment can only be made under Schedule A, whether the rents exceed the annual value or not. The Inland Revenue on the other hand contend that they have an option to charge under whatever Schedule is more advantageous to them, always making an adjustment against double taxation. They say that the respondents carry on a trade, and for the full profits and gains of such trade they are chargeable whether the income is derived from property in land or not.

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(1) [1915] A. C. 433.

(2) 1921 S. C. 372.

The sum in dispute is considerable. Except in London the question would hardly arise. Annual value under Schedule A as measured by r. 1 is the actual rent if the hereditaments were let at a rack rent within seven years of the assessment, or, if not, the rack rent which they are actually worth subject to the statutory allowances. The Inland Revenue can hardly lose and may gain on this computation of income. But in the Administrative County of London as provided by the terms of Schedule A the annual value is to be the annual value as fixed under the Valuation (Metropolis) Act, 1869. It therefore may happen that the fact that the valuation is made quinquennially, that an allowance is made for empties, and that the actual cost of repairs in any year or three years may be less than the statutory allowances will cause the profits calculated under Schedule D to be greater than the annual value. Of course the opposite result may follow, and in such case the tax-gatherer would doubtless exercise his option for Schedule A.

My Lords, I think that this case should be decided in favour of the respondents upon the simple ground that annual income derived from the ownership of lands, tenements and hereditaments can only be assessed under Schedule A and in accordance with the rules of that Schedule. In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern. For the purpose of assessing such profits for the purpose of Schedule D the income so derived is not to be brought into account. The option of the Revenue authorities to assess under whichever Schedule they prefer in my opinion does not exist, and is inconsistent with the provisions of the Income Tax Acts throughout their history.

The scheme of the Income Tax Acts is and always has been to provide for the taxation of specific properties under Schedules appropriated to them, and under a general Schedule D to provide for the taxation of income not dealt with specifically. Schedule A provides for the taxation of income derived from property in land; B for income derived from the occupation of land; C for income derived from Government securities; E for income derived from employment in the public service. It is unnecessary to go further back than the Income Tax Act of 1842, the provisions of which were incorporated in every Customs and Inland

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Revenue or Finance Act up to 1918, when the present Consolidation Act was passed. I need not repeat the familiar Schedules altered and extended by the Act of 1853. It is only necessary to refer to s. 100 of the Act of 1842, which defined the tax to be imposed under Schedule D: "The duties hereby granted, contained in the Schedule marked (D.), shall be assessed and charged under the following rules; which rules shall be deemed and construed to be a part of this Act, and to refer to the last-mentioned duties, as if the same had been inserted under a special enactment.

"*Schedule D.*

"The said last-mentioned duties shall extend to every description of property or profits which shall not be contained in either of the said Schedules (A.), (B.), or (C.), and to every description of employment of profit not contained in Schedule E."

My Lords, nothing could be clearer to indicate that the Schedules are mutually exclusive; that the specific income must be assessed under the specific Schedule; and that D is a residual Schedule so drawn that its various Cases may carry out the object so far as possible of sweeping in profits not otherwise taxed. For this reason no doubt the actual Schedule was drawn in the widest terms. "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere," etc. Such language covers income from land in Schedule A and from Government securities in Schedule C. Its true meaning is made apparent by s. 100. Moreover, the dominance of each Schedule A, B, C and E over its own subject-matter is confirmed by reference to the sections and rules which respectively regulate them in the Act of 1842. They afford a complete code for each class of income dealing with allowances and exemptions, with the mode of assessment and with the officials whose duty it is to make the assessments. Thus under A and B the assessment and collection is regulated by the general Commissioners; under

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C the assessment is by Commissioners specially appointed for the purpose; under E the assessment and collection are made in the departments or by the officers of the public corporations concerned: while under D the assessment is regulated by additional Commissioners. I find it impossible to conceive that these various Commissioners had an option to encroach upon the duties of one another, or that the taxpayer was exposed to having his income freed from the restrictions and exemptions imposed by statute under one Schedule in order to be subject to a different set of restrictions and exemptions imposed by statute under another Schedule. To take a concrete instance which has been before the Courts it seems to me impossible that the Legislature intended that a farmer taxed for profits of his occupation under Schedule B might at the option of the authorities after a successful year or term of years be taxed on his profits under Schedule D. The point was decided by the Court of Appeal in *Back* v. *Daniels*. (1) It was argued that this decision turned on the express option given to the occupier to be assessed under Schedule D, which therefore negatived an implied option in the authorities to assess him under that Schedule. The express option to the occupier was not given until 1887 by the Customs and Inland Revenue Act of that year. I confess I fail to see why an option given to the taxpayer should negative the existence of an option in the tax gatherer, still less how an option given for the first time in 1887 should destroy an option in the tax gatherer which on the hypothesis had been in existence since 1842. The judgments do not support any such contention. Similarly I am of opinion that income derived by a trading company from investments of its funds, whether temporary or permanent, in Government securities must be taxed under Schedule C, and cannot for the purposes of assessment under Schedule D be brought into account. I am clearly of opinion that the Act of 1918, which is expressed to be a Consolidation Act, did not alter the law so as to give to the authorities an option they did not possess before. It is true that the words of Schedule D and the cases are wide

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(1) [1925] 1 K. B. 526.

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as before; the words as to annual profits or gains arising to any person residing in the United Kingdom from any kind of property whatever are repeated. But they must be cut down as they were before. I may refer to one expression in the Rule applicable to Case III., 1 (*a*), where it is provided that the tax shall extend to "any . . . . other annual payment whether such payment is payable as . . . . a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods." This would include rent under a lease, but it is obviously not intended to cover cases under Schedule A. I attach no importance to the express exception in some of the Rules under D of income coming within named other Schedules. They are inserted ex majori cautela, and similar instances can be found in the Rules under the former Act where, as I have stated, the position was clearly expressed by s. 100. Believing, as I do, that the specific Schedules A, B, C, and E, and the rules thereunder contain definite codes applying exclusively to their respective defined subject-matters I find no ground for assessing the taxpayer under Schedule D for any property or gains which are the subject-matter of the other specific Schedules. In the present case the income from the offices should be and has been assessed under Schedule A on the annual value as prescribed by statute. It therefore is not the subject-matter of assessment under D. I should add that if there had been an option to assess under A or D I cannot conceive a more conclusive election under the option than the assessment and receipt of payment under Schedule A, but this point need not be determined.

The *Rotunda* case (*Coman* v. *Governors of the Rotunda Hospital, Dublin* (1)), much relied on by the appellants, appears to me to afford them no help. In that case Lord Birkenhead expressed the view that the lettings were not such as to constitute the relation of landlord and tenant, but the possession and occupation of the rooms remained with the respondent. Lord Cave expressly held that the

(1) [1921] 1 A. C. 1, 23, 24.

profits in question were not assessable under Schedule A, and accordingly fell to be assessed under Schedule D. Lord Finlay appears to have been of the same opinion. The case merely decided that the respondents, the governors of the hospital, used their own premises of which they were in occupation for the purpose of carrying on a profitable trade, and that they were liable to be assessed under Schedule D for those profits with the statutory deduction of the annual value assessed under Schedule A. The case entirely differs in its facts, and appears to throw little light on the law in question before this House.

The *Rosyth* case (1), so far as it decided that the Inland Revenue authorities have an option to select which Schedule they prefer, must I think be held to be wrongly decided. The actual decision may possibly be supported on the view that for the purpose of the particular claim for exemption the whole profits must be calculated under a notional Schedule D, which would pay no regard to other Schedules. It is unnecessary in the present case to discuss that matter.

I desire to add that I do not desire to throw any doubt upon decisions which indicate that the Inland Revenue authorities may have an option as to the several Cases of any given Schedule upon which they may determine to assess the taxpayer. An option within a Schedule is not the same thing as an option to select Schedules.

My Lords, it may well be that another mode of expressing the result I have stated is to hold that a person capable of being assessed under Schedule A cannot be said in respect of his income from land to be earning profits from "trade." This view appears to commend itself to some of your Lordships. I do not dissent from it, but I view it with some misgiving. I find it difficult to say that companies which acquire and let houses for the purposes of their trade, such as breweries in respect of their tied tenants and collieries, and other large employers of labour in respect of their employees, do not let the premises as part of their operation of trading. Personally I prefer to say that, even if they do trade in letting houses, their income, so far as it is derived from that part of their trading, must be taxed under Schedule A and not Schedule D. I agree that this appeal should be dismissed.

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(1) 1921 S. C. 372.

LORD TOMLIN. My Lords, this is an appeal by His Majesty's inspector of taxes against an order of the Court of Appeal dated June 26, 1929, reversing a decision of Rowlatt J. That learned judge had dismissed the respondents' appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts confirming assessments to income tax made upon the respondents under Schedule D for the four years ending April 5, 1928.

The respondents are a limited company formed in 1902 to acquire a large block of buildings known as Salisbury House and to let out as offices the rooms contained in the block.

Since their incorporation the respondents have held, let and managed Salisbury House. They have not acquired, managed or dealt in any other property.

Salisbury House contains some 800 rooms let to 200 tenants or thereabouts. The lettings are all unfurnished lettings of single rooms or suites.

The respondents maintain and operate the lifts in the building, and for this purpose and for the purpose of keeping clean the halls, corridors and staircases provide a staff of some eighty to ninety persons under the supervision of a housekeeper.

Under the respondents' standard form of lease certain sums are payable by the tenants by way of additional rents. These sums represent contributions by the tenants towards the cost of lighting the halls, corridors and staircases and like matters. Some of the tenants also pay to the respondents remuneration for certain cleaning and other services rendered to them.

The respondents have throughout in respect of Salisbury House been directly assessed to income tax on the whole building under Schedule A, No. VII., r. 8 (*c*), of the Income Tax Act, 1918. As the property is situate within the Administrative County of London the annual value with respect to Schedule A is by s. 45 of the Valuation (Metropolis)

Act, 1869, deemed to mean the gross value stated in the valuation list under that Act. By s. 4 of the same Act gross value means the annual rent which a tenant might reasonably be expected taking one year with another to pay for an hereditament.

The rents actually received during the years of assessment exceeded by a substantial amount the assessed value for the purposes of Schedule A.

From the case stated it appears that at the hearing before the Commissioners the respondents admitted that they were liable to be assessed under Schedule D upon any profit which they derived from Salisbury House tenants outside the mere rents for the offices so far as such profits might be described as resulting from a trade.

For the purpose however of the assessments appealed against the profits of the respondents were computed by taking the total of their receipts from all sources, including the rents received by them from the lettings of rooms in Salisbury House and deducting therefrom their expenses and the amounts of the assessments under Schedule A made upon the respondents in respect of the premises.

The Special Commissioners confirmed the assessments, stating that they did so following a previous decision of the Commissioners and in deference to opinions expressed in the Court of Session in the case of the *Rosyth Building and Estates Co.* (1)

The sole question upon which the opinion of the Court was desired by the Special Commissioners was whether the rents received by the respondents on letting the offices in Salisbury House were properly to be included in the assessments as trade receipts of the respondents for the purposes of Case I. of Schedule D of the Income Tax Act, 1918.

Rowlatt J. apparently took the view that the respondents were carrying on a trade in the nature of an hotel business and that the assessments were rightly made.

The Court of Appeal however rejected this view of the case, and in substance held that a landowner who happens to make taxable profits by rendering certain services to his tenants cannot for that reason be treated as carrying on a trade in respect of the receipt of rents so as to be chargeable with income tax under Schedule D upon the excess of the actual rents over the annual assessments to tax under Schedule A.

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(1) 1921 S. C. 372.

The arguments presented to your Lordships' House on behalf of the appellant as I understand them may be stated as follows :—

(1.) It is true that tax under Schedule A is necessarily charged in every case in respect of the property in all lands, tenements and hereditaments.

(2.) Where however, besides receiving his rents, the landowner, by means of rendering services to his tenants or otherwise in relation to the management of his land, makes profits taxable under Schedule D there may come a point where his activities which earn profits and his perception of rents must be treated as a business concern in the nature of an indivisible trade taxable under Schedule D, and this is inevitably the case if the landowner is a limited company formed to acquire and manage land.

(3.) In the condition of affairs last supposed the Revenue authority has an option so far as the lands are concerned either to rely upon the Schedule A assessments or to require the rents to be brought in as part of the gross trade receipts, a deduction of the Schedule A assessment being allowed where the rents exceed such assessment.

My Lords, in my view the scheme of the Income Tax Act, 1918, properly understood, does not afford support for these arguments but leads to an opposite conclusion.

Sect. 1 of the Act provides that " where any Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged for that year in respect of all property profits, or gains respectively described or comprised in the Schedules marked A, B, C, D, and E, contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules."

Schedule A begins with the following words : " Tax under Schedule A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom, for every twenty shillings of the annual value thereof."

The Rules under Schedule A prescribe (No. VII., r. 4) that "Tax under this Schedule shall be charged on all lands, tenements and hereditaments whether occupied at the time of assessment or not."

For lands outside the Administrative County of London as for lands within that county rent or rental value is the measure of annual value: see Schedule A, No. I., and cf. s. 45 of the Valuation (Metropolis) Act, 1869.

Now income tax is one tax. There is not a separate tax under each Schedule: see *London County Council* v. *Attorney-General.* (1)

Further there is admittedly no double taxation. A subject-matter of taxation properly assessed to the tax under one Schedule cannot be brought again into assessment under another Schedule.

Land in regard to its property quality is assessable to tax under Schedule A, and in regard to its occupation quality is assessable to tax under Schedule B. There may also be such utilization of the land attributable neither to the property quality nor to the occupation quality producing profits assessable to tax under Schedule D: see *Coman* v. *Governors of the Rotunda Hospital, Dublin.* (2)

Putting aside the special cases dealt with in Schedule A, No. III., tax in respect of the property quality in land is exigible under Schedule A on the annual value measured by reference to rental value. The tax is a charge on the property, and is inescapable. Neither the Revenue authority nor the taxpayer can demand to exclude the subject-matter from the Schedule.

When once the annual value has been ascertained and fixed for the purposes of Schedule A, it is irrelevant to consider whether the landlord in fact receives by way of rent more or less than or the same as the assessed annual value.

(1) [1901] A. C. 26. (2) [1921] 1 A. C. 1.

The subject-matter—namely, land in respect of its property quality—being necessarily taxed under Schedule A cannot be brought again under any other Schedule. To do so would offend the rule against double taxation.

The option which the Revenue authority sets up here is in my judgment inconsistent with the scheme of the Act, and in particular with the obligation of the authority to tax under Schedule A. If such an option existed it would be reasonable to expect machinery whereby, upon the exercise of the option in the direction of some Schedule other than Schedule A, allowance could be made in respect of the tax necessarily exigible under Schedule A. No such machinery is in fact provided by the statute, and the Revenue authority has been driven in this case to invent it to meet the objection of double taxation. It is noteworthy that, where a landowner carries on a trade on his own property, the computation of tax is to be made exclusive of the annual value of lands occupied for the purpose of the trade and separately assessed and charged under Schedule A: see Schedule D, Cases I. and II., r. 5.

I am therefore of opinion that as between Schedule A and other Schedules the Revenue authority has no option to select the Schedule to be applied, and in this respect I disagree with the reasoning upon which the decision in the *Rosyth Building and Estates Co., Ld.* v. *Rogers* (1) was based.

Further in my view the perception of rents as landowner is not an operation of trade within the meaning of the Act. If this be so, I am unable to appreciate how the existence of ancillary activities which produce profits taxable under Schedule D can affect the nature of the operation or how the legal significance of the perception is altered for the purpose of income tax if the recipient is a limited company rather than an individual.

My Lords, for the reasons which I have endeavoured to indicate, I reach the conclusion that the decision of the Court of Appeal was correct, and I think that this appeal should be dismissed with costs.

(1) 1921 S. C. 372.

LORD MACMILLAN. My Lords, the respondent company owns a large block of buildings in the City of London known as Salisbury House, containing some 800 rooms. These rooms the company lets unfurnished singly or in suites to tenants as business offices, and derives therefrom a large revenue in rents. Certain services are rendered by the servants of the company, such as cleaning, watching and lighting, for which charges are made to the tenants. The company has no other activities beyond acting as landlords of the premises and performing the services mentioned.

The broad question raised by the appeal now under your Lordships' consideration is as to the proper method of assessing the company to income tax, although the actual issue relates to the validity of assessments made upon the company under Schedule D for the four years ending April 5, 1928.

The first step taken by the Inland Revenue authorities in each of the years in question was to assess Salisbury House to income tax under Schedule A upon the gross value as appearing in the valuation list in accordance with the Valuation (Metropolis) Act, 1869, s. 45. The assessments were made upon the company as landlords under Schedule A, No. VII., r. 8, which provides that "the assessment and charge shall be made upon the landlord in respect of . . . . (c) any house or building let in different apartments or tenements and occupied by two or more persons severally. Any such house or building shall be assessed as one entire house or tenement." The tax exigible upon these assessments was duly demanded by the Crown and duly paid by the company.

The Inland Revenue authorities, taking the view that the company were not only landlords but also traders, proceeded in addition to assess the company under Schedule D on the annual balance of its profits or gains, claiming that on the credit side of the computation there should be entered the rents received and the receipts from services rendered, while on the debit side it was conceded that the assessments under Schedule A should be entered as well as all expenses incurred by the company in earning their profits. The company challenged the validity of these assessments, but admitted that it was liable to be assessed under Schedule D on any profit apart from rents which it earned from rendering in connection with the premises the various services mentioned.

The Commissioners decided that the assessments under Schedule D were rightly made to include the amounts by which the total receipts of the company (including its rents from offices) less expenses exceeded the Schedule A assessments. This decision was affirmed by Rowlatt J., but was reversed by the Court of Appeal. The Crown now appeals to your Lordships' House, and asks that the decision of the Commissioners and Rowlatt J. be restored. Important questions of principle not hitherto directly the subject of consideration in this House are involved in the determination of the case.

As I approach the problem, the first question which presents itself is whether the Revenue authorities were bound to assess the premises under Schedule A. They did so, but had they any option in the matter? In my opinion they had none, and the assessments made under Schedule A were not only proper but obligatory. Sect. 1 of the Act of 1918 enacts that income tax is to be charged "in respect of all property, profits or gains respectively described or comprised in the Schedules marked A, B, C, D and E contained in the First Schedule to this Act and in accordance with the Rules respectively applicable to those Schedules." Turning to Schedule A, I find that it opens with the words "Tax under Schedule A shall be charged in respect of the property in all lands, tenements, hereditaments, and heritages in the United Kingdom for every twenty shillings of the annual value thereof." The Rules applicable to Schedule A provide (No. VII., r. 4) that "tax under this Schedule shall be charged on all lands, tenements and hereditaments." I may refer also to s. 110, sub-s. 1, which enacts that "the assessments under Schedules A and B for any parish shall contain — (*a*) the full and just annual value of all lands, tenements, hereditaments and heritages estimated in each particular case as directed by this Act; and (*b*) the names of the occupiers and proprietors thereof." It is clear from these and other provisions of the income tax code, which it is unnecessary to refer to in detail, that it is obligatory to assess to income tax under Schedule A all lands, tenements, hereditaments and heritages in the United Kingdom, and that the Revenue authorities have no option in the matter. If they have an option as regards other sources of income in the matter of the Schedule under which they may charge them, upon which I do not consider it necessary for the present purpose to pronounce, it is at least certain that they must charge tax in respect of property in land under Schedule A. An examination of the Income Tax Acts past and present establishes that a clear distinction has always been drawn between income from land and income from all other sources.

The subject of tax is all property as well as all profits or gains, and indeed the tax under Schedule A is designated property tax not only colloquially but on official forms. Schedules A and B in combination contain and in my view contain exhaustively and exclusively the charge upon landed property, the former containing the tax on the owners of land and houses in respect of the property in them and the latter containing the tax on the benefit derived from the occupation of land.

The consequences of this are far-reaching for the present purpose. If the Revenue authorities must assess Salisbury House under Schedule A they must do so on the annual value thereof ascertained in the manner prescribed by the Rules applicable to that Schedule.

The premises being situated within the Administrative County of London the annual value with respect to Schedules A and B is by s. 45 of the Valuation (Metropolis) Act, 1869, to be deemed to mean the gross value stated in the valuation list under that Act, and by s. 4 gross value means "the annual rent which a tenant might reasonably be expected taking one year with another to pay for an hereditament" on ordinary letting terms. Rent or rental value is thus the criterion of annual value for the purpose of the tax on

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property under Schedule A. Similar provisions apply to lands outside the Metropolis under "No. I.—General Rule for estimating the annual value of lands, tenements, hereditaments or heritages." Here also rent or rental value is the criterion of annual value for the purposes of taxation.

Once it is determined that the annual value of all lands and houses must be assessed to income tax under Schedule A it follows that this annual value cannot be assessed to income tax under any other Schedule, for it is elementary that the same source of income cannot be twice taxed. Income tax is one tax, not several taxes (*London County Council* v. *Attorney-General* (1)), and the annual value of a particular property having been once assessed to income tax cannot be reassessed to the same tax.

The explanation of the assessments under appeal is obvious. If the rents received by the respondent company were the exact equivalent of the annual value of the property in the metropolitan valuation lists the Crown would have no interest in seeking to assess the company under Schedule D, because it would receive under Schedule A all the tax to which the rents were liable, while any profits from services rendered are admittedly assessable under Schedule D. Thus the whole income derived by the company in respect of its property would yield tax. But the company, in fact, lets out its rooms at rents which are in excess of the annual value of its premises, and consequently if the company is assessed only under Schedule A the excess of the rents received over the annual value escapes taxation.

This circumstance in my opinion affords no justification for the attempt to treat the company as a trading concern whose profits are assessable under Schedule D. Landowning, however profitable, is not a trade within the meaning of the income tax code. Property in land as a source of income is dealt with, and can only be dealt with under Schedule A, and the rules of that Schedule prescribe how the income from landed property is to be ascertained and measured. If the measure is an imperfect one and when applied does not

(1) [1901] A. C. 26.

ascertain the actual income derived from the property so much the worse for the revenue. Discrepancies one way or the other between actual income and statutory income for tax purposes are familiar features of income tax law. Theoretically, the annual value and the rental should correspond, for annual value is based on rent. If they part company one way or the other the fault lies with the imperfection of the statutory machinery for ascertaining the income from landed property, and the Inland Revenue authorities are not entitled to resort to a different measure designed for a different source of income if the actual rents happen to exceed the annual value.

It is necessary, however, to make it quite clear that the income from property which is taxable under and only under Schedule A is income derived from the exercise of property rights properly so called.

Property is regarded as yielding income from the exercise by the proprietor of the right either of himself enjoying the possession or of parting with the possession by letting his property to tenants. The owner of property may make profit out of it in other ways, and by doing so he may render himself liable to taxation under Schedule D. The case of *Coman* v. *Governors of the Rotunda Hospital, Dublin* (1), is an excellent example. There, as Lord Birkenhead L.C. pointed out, the arrangements between the owners of the premises and the persons who paid for their use for the purpose of entertainments were not such as to constitute the relation of landlord and tenant, and the owners remained in possession and occupation of their property. The receipts derived from hiring out their premises along with various movable fittings and affording services in the way of heating, lighting and attendance were receipts of an enterprise quite distinct from the ordinary receipts which a landlord derives from letting his property. Consequently the owners of the premises were rightly held to be engaged in the carrying on of a trade or business in their premises, " the trade or business " in Lord Shaw's language, " of providing or providing for public entertainments." There is nothing to prevent a landlord who has been assessed under Schedule A in respect of his income as a property owner being also assessed under Schedule D in respect of a trade, business or other enterprise carried on by him on his premises.

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(1) [1921] 1 A. C. 1, 8, 37.

It is not without significance that in the case of certain kinds of property the annual value under Schedule A is directed to be ascertained in accordance with the Rules applicable to Schedule D, that is to say on a profits basis. Under the Rules applicable to Schedule A, No. III.: (1.) quarries, (2.) mines, and (3.) an enumerated series of undertakings mostly of a public utility character and " other concerns of the like nature " are directed to be assessed on an annual value based on profits, not rental, and the profits are to be arrived at as if they were trading concerns. In the case of *Edinburgh Southern Cemetery Co.* v. *Surveyor of Taxes* (1), where it was held that a cemetery company should be assessed under Schedule A, No. III., r. 3, as a " concern of the like nature " with the enumerated concerns, Lord M'Laren said : " It is certainly not sufficient to bring a particular use of land within the scope of Rule III. that the proprietor of the land is using it in connection with his trade or for purposes of trade ; because in such cases it is generally possible to separate the income into two parts, the one representing the rent or annual value of the heritable property and the other representing the commercial profit. Where this can be done, the proper mode of assessing seems to me to assess under Schedule A in respect of annual value, and also under Schedule D for the commercial profits of the business or manufacture carried on within the heritable subjects. But there are cases where it is very difficult to separate the income of a proprietor into rental and commercial profits. Rule III. appears to have been devised to meet such cases." His Lordship proceeds to point out that the income of the company was " neither derived from the location nor from the occupation of land " but from " a trade which is carried on by the use of land "—namely, the sale of perpetual rights of sepulture in specified portions of the company's land.

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(1) 17 R. 154, 165.

The present case does not fall within any of the classes of concerns where by the Rules under No. III. of Schedule A the annual value of property is to be determined on the basis of profits in conformity with the Rules of Schedule D. The income of the company being derived from the location of land, or in other words in the normal manner in which property in land yields revenue, it is in my opinion inadmissible to characterize this income as the income of a trade. Where a trade is carried on by a proprietor in his own premises r. 5 of the Rules applicable to Cases I. and II. of Schedule D provides for the exclusion from the tax computation of the annual profits or gains of the property occupied for the purpose of the trade. This clearly contemplates a separation between the two characters of landowner and trader. A landowner may conduct a trade on his premises, but he cannot be represented as carrying on a trade of owning land because he makes an income by letting it. The relatively insignificant services for which the company makes charges to its tenants are not in my opinion sufficient to convert the company from a landowner into a trader, though the profits so made may quite properly be charged with tax under Schedule D. To hold otherwise would be to invert the rule that the principal follows the accessory.

The circumstance that the Crown has proposed, in assessing the company under Schedule D, to deduct the assessments under Schedule A affords to my mind strong evidence of the illogicality of the whole proceeding. I do not understand how an assessment to income tax can ever be a proper deduction from an assessment to income tax, for the tax is one tax. It is nothing to the purpose to say that under Schedule D it is proposed to tax actual rents while under Schedule A it is the annual value which has been taxed. The source of the rents and of the annual value is one and the same—namely, the property in Salisbury House.

It follows from the views which I have above expressed that I do not agree with the reasoning on which the decision in the case of the *Rosyth Building and Estates Co.* v. *Rogers* (1) is based. In my opinion the principles applicable to this case are accurately expounded in the judgments of the Court of Appeal, and I concur in the motion that the appeal be dismissed. This should also be the fate of the other appeal before your Lordships in the case of the *City of London Real Property Company, Ld.*, which it was admitted is indistinguishable.

In each case :—

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, April 4, 1930.

In FRY *v.* SALISBURY HOUSE ESTATE, LIMITED.

Solicitor for the appellant : *Solicitor of Inland Revenue.*
Solicitors for the respondents : *Holmes, Son & Pott.*

In JONES *v.* CITY OF LONDON REAL PROPERTY COMPANY, LIMITED.

Solicitor for the appellant : *Solicitor of Inland Revenue.*
Solicitors for the respondents : *Vincent & Vincent.*

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(1) 1921 S. C. 372.

[HOUSE OF LORDS.]

H. L. (E.)*
1930
March 25.

HOLE . . . . APPELLANT;

AND

GARNSEY . . . . RESPONDENT.

Industrial and Provident Society—Alteration of Rules—Ultra vires—Liability of Members to take additional Shares—Contract between Members and Society—Voluntary Liquidation—Industrial and Provident Societies Act, 1893 (56 *&* 57 *Vict. c.* 39), *ss.* 4, 22, 60; *Sch. II.*

An alteration in the rules of a Society registered under the Industrial and Provident Societies Act, 1893, requiring members of the Society to subscribe for additional shares is not binding on members who have neither voted for the alteration nor otherwise assented to it; consequently, such members cannot be placed on the list of contributories in the voluntary liquidation of the Society in respect of such additional shares:—

So *held* by Viscount Dunedin, Viscount Sumner, Lord Atkin and Lord Tomlin (Lord Buckmaster dissenting).

Biddulph and District Agricultural Society Ld. v. *Agricultural Wholesale Society Ld.* [1927] A. C. 76 explained and distinguished.

Decision of the Court of Appeal [1929] 1 Ch. D. 321 reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Romer J. (2)

The following statement of facts is taken from the opinion of Viscount Dunedin:—

"The appellant in this case was a member of a Society called the Wilts and Somerset Farmers, Ld., which is a Society registered under the Industrial and Provident Societies Act, 1893, and the respondent is the liquidator of that Society, which is in liquidation.

The object of the Society was to dispose of agricultural and dairy produce produced by its members. As originally constituted the shares were 1*l.* shares. No member in his own name was allowed to hold more than 200*l.* worth of shares, but a practice had grown up for members to take further shares in the name of some member of their family as nominee. The appellant held 200 shares of his own and 71 in the name of his son as nominee. By the rules of the Society as originally constituted, and as they stood when the appellant had acquired all the said shares, it was provided as follows :—

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD ATKIN, and LORD TOMLIN.

(1) [1929] 1 Ch. 321.

(2) [1928] Ch. 809.

Rule 12.—'Individual members shall hold at least one share for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and at least one share for every 40 acres or fraction of 40 acres above 500. In arriving at the acreage Down land may be eliminated at the discretion of the Committee. Milk retailers shall hold at least six shares for every churn of 17 gallons retailed daily by them, societies or companies which are members shall hold at least five shares.' . . . .

Rule 6.—'Shares shall be transferable, but not withdrawable.' . . . .

Rule 18.—'No transfer of shares shall be valid unless the Committee's consent has been obtained thereto.' . . . .

Rule 64.—'The rules may be amended by resolution of a three-fourths majority at a special general meeting. No amendment of rules shall be valid until registered.'

On November 14, 1921, the appellant being a member of the Society and holding shares as aforesaid, Rule 12 was rescinded and the following Rule was substituted :—

'Individual members shall hold at least five shares for every 20 acres or fraction of 20 acres farmed by them up to 500 acres and at least three shares for every 40 acres or fraction of 40 acres above 500. In arriving at the acreage Down land may be eliminated at the discretion of the Committee. Milk producers shall hold shares on the above acreage basis or shall hold at least five shares for every dairy cow owned by them whichever shall be the greater number of shares.'

On December 21, 1921, Rule 6 was amended to read as follows :—

'Shares shall be transferable but not withdrawable. They shall be of the nominal value of 6*s.* 8*d.*, which shall be payable upon application.'

At the same time an additional Rule was made to follow Rule 6:—

'The nominal value of each of the issued and fully paid shares of the Society shall be reduced from the sum of 1*l.* to the sum of 6*s.* 8*d.* by cancelling the sum of 13*s.* 4*d.* upon each share. . . . .'

On March 25, 1922, Rule 12 (as amended on November 14, 1921) was further amended by substituting for the words 'five shares' in the two places in which they occurred the words 'shares of the nominal value of 5*l.*'

All these various amendments were carried by a three-fourths majority of the shareholders, but the appellant was not one of the majority and never in any way assented to these alterations. The result of the last amendment was, if it was valid, to impose on many members of the Society an obligation to take many additional shares, nor could they get rid of their liability by transference. A shareholder named Dibble raised an action against the Society on June 22, 1922, contesting the validity of the last amendment. The action was decided in his favour on January 17, 1923, by Lawrence J. (1) and the Society did not appeal, so that the matter became res judicata with Dibble. On January 30, 1923, the Society went into liquidation and the respondent was appointed liquidator. The respondent so far acquiesced in the decision in *Dibble's* case that he took no steps to put the appellant and other shareholders in the same position as Dibble on the list of contributories.

On April 23, 1925, the Court of Appeal decided the case of the *Agricultural Wholesale Society, Ld.* v. *Biddulph and District Agricultural Society, Ld.* (2), in the course of which they held that the case of Dibble had been wrongly decided. This case was taken to this House and on July 29, 1926, your Lordships' House affirmed the decision as between the parties on the merits. On hearing of this decision the respondent proceeded to put the appellant and others who were in the same situation on the list of contributories and so informed them by circular letter. As the appellant under the rules so amended needed to hold shares of the nominal value of 200*l.*, i.e., 600 shares, and as he only with the addition of the shares held by his son held 271, he was put on the list for 329 shares with a liability of 6*s.* 8*d.* on each share. As the appellant denied liability the question was raised by the respondent by an originating summons and the question asked as to the liability of the appellant and others to be put on the list of contributories under the circumstances described.

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(1) *Dibble* v. *Wilts and Somerset Farmers, Ld.* [1923] 1 Ch. 342.

(2) [1925] Ch. 769; [1927] A. C. 76.

Romer J. in a careful judgment came to the conclusion that, at least so far as he was concerned, the case was ruled by the *Biddulph* case (2) and confirmed the decision of the liquidator to put the appellant on the list of contributories. The Court of Appeal treated the matter as very obvious and without calling on the respondent affirmed the judgment. Against that judgment the present appeal is taken."

1929. Dec. 16, 17. *H. B. Vaisey K.C.* and *H. S. G. Buckmaster* for the appellant.

Wilfrid Greene K.C., *Rowland Thomas* and *F. Renfield* for the respondent.

The arguments on the appeal were substantially the same as those used before Romer J.

1930. March 25. LORD BUCKMASTER. My Lords, The Wilts and Somerset Farmers, Ld., was registered under the Industrial and Provident Societies Act of 1893 on March 23, 1910, and on January 30, 1923, it went into voluntary liquidation, the respondent being appointed liquidator. In the liquidation it was sought to place the appellant on the list of contributories under the following circumstances.

The original rules fixed the shares at the nominal value of 1*l.* and provided by Rule 12 that individual members should hold at least one share for every 20 acres or fraction of 20 acres farmed by them up to 500 acres, and one share for every 40 acres or fraction of 40 acres above 500. There was also a provision fixing the shareholding of milk retailers, which is not relevant. Rule 13 provided that the total number of shares held by any member should not exceed 200*l.*, and Rule 64 provided that the rules might be amended by resolution of a three-fourths majority at a special general meeting.

On November 14, 1921, the rules were amended so as to provide that individual members should hold at least five shares for every 20 acres up to 500, and three shares for every 40 acres or fraction of 40 acres above 500 and that: "Milk producers shall hold shares on the above acreage basis or shall hold at least five shares for every dairy cow owned by them whichever shall be the greater number of shares."

On December 21, 1921, the rules were again amended in the following way:—

"Rule 6.—Shares shall be transferable but not withdrawable. They shall be of the nominal value of 6*s.* 8*d.*, which shall be payable on application."

At the same time, the following new Rule was added:—

"Rule 6a.—The nominal value of each of the issued and fully paid shares of the Society shall be reduced from the sum of 1*l.* to the sum of 6*s.* 8*d.* by cancelling the sum of 13*s.* 4*d.* upon each share. Each of the shares of the Society which have been issued and are not fully paid shall likewise be reduced to the nominal value of 6*s.* 8*d.*, but so that the existing liability in respect of unpaid capital on such shares respectively shall not be extinguished or reduced.

"Each person who since the 1st day of June last has made to the Society an application for shares in the Society shall in the event of his application being accepted by the Society receive an allotment of three shares in the Society of the nominal value of 6*s.* 8*d.* each in respect of every share of the nominal value of 1*l.* applied for."

On March 25, 1922, Rule 12 of the original rules as amended was further amended by substituting for the words "five shares" in the two places in which they occur the words "shares of the nominal value of 5*l.*"

In May of 1922 the Society issued to its members a letter calling up the appropriate amount from each of the 1200 members to whom Rule 12 as amended appeared to apply. These 1200 members, of whom the appellant was one, disputed the demand to subscribe for further shares and alleged that the rules which had been passed were ultra vires. Proceedings were then taken against the Society, which were heard by Lawrence J. (1), who decided that Rule 12 both in its original form and as amended was ultra vires, the main ground of his decision being that such rules interfered with the principle of limited liability and was, therefore, void by analogy with the Companies Act.

In 1925 a similar question arose in a case between the Biddulph and District Agricultural Society, Ld., and the Agricultural Wholesale Society, Ld. (2) This latter Society was registered on September 14, 1914, and the qualifying Rule there was one which provided that each Society or Company which was a member of the Agricultural Wholesale Society should hold one share for fifty, or any fraction of fifty, of its members. The Biddulph Society became a member and, having between 50 and 100 members, took up two shares of 1*l.* each. At a later date, by a special resolution passed on May 1 and May 16, 1918, the Agricultural Society amended its rules and provided by a new Rule 6 that every existing member should within three calendar months after June, 1918, take up such a number of shares as, together with the existing shares of such member, would make up the number which such society if a new member would have had to take up, and it also provided that every society should within six months after the end of each financial year apply for and take up such further shares as would represent an increase in membership and turnover over that on which its then present holding of shares should have been calculated. The effect of this alteration was that the Biddulph Society became bound forthwith to take up additional shares and also within six months after the end of each financial year to take up

(1) *Dibble* v. *Wilts and Somerset Farmers, Ld.* [1923] 1 Ch. 342.

(2) *Agricultural Wholesale Society, Ld.* v. *Biddulph and District Agricultural Society, Ld.* [1925] Ch. 769; [1927] A. C. 76.

further shares representing its increase in membership and turnover.

On August 12, 1918, the Agricultural Society brought this alteration to the notice of the Biddulph Society, who thereupon asked for an estimate of the number of shares for which it was liable, and, on being informed that this was 472, they applied for these 470 additional shares. The shares were issued and the amounts paid. As membership and turnover of the Biddulph Company increased from year to year they became bound, if the rules were valid, to take up a further 2211 shares, and this they refused to do. Proceedings were then taken to compel acceptance of the shares. The case came originally before Lawrence J., who followed his own former case, and finally to the Court of Appeal, who reversed his judgment. From the judgment of the Court of Appeal an appeal was taken to this House. (1)

I have set out the facts in some detail, because the first and, to my mind, the most difficult question in this case is whether the decision that this House then reached does not bind us on the present occasion. They dismissed the appeal, and held that the Biddulph Company was liable to take the shares, but, in order to ascertain exactly what was the foundation and effect of this decision, it is necessary to see what it was that had happened in the Court of Appeal. The Agricultural Society presented their case before the Court of Appeal upon two grounds: first, that an obligation to take the 2211 shares arose under the rules and, alternatively, that there was a contract to take them, which was to be implied from the circumstances in which the Biddulph Company had applied for the 472 shares. The Court of Appeal overruled *Dibble's* case (2), and made a declaration in these words: "that under and by virtue of the agreement under Rule 6, 1918, and in the events which have happened the defendants became and were at the date of the issue of the writ in this action liable to take 2211 shares of 1*l*. each in the plaintiff Society."

It is impossible to read this judgment and to follow what took place in the Court of Appeal without seeing that their conclusion was based entirely upon the view that the alteration of the rule was within the powers of the Society. An agreement "under the rule" cannot mean an agreement outside the rule, and "the events which have happened" are the increase in the turnover and membership of the Biddulph Company. The alternative contention that there was a contract to take shares outside the rules was not dealt with. It is in the light of these facts that the opinions in the House of Lords need to be regarded.

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(1) [1925] Ch. 769; [1927] A. C. 76.

(2) [1923] 1 Ch. 342.

The Lord Chancellor treated the application for the 470 shares as effecting a contract, but a contract that was not independent of the rules, for he said that, in his view, the result of it was to compel the applicants, as by a covenant under seal, to take the further shares—a result which could only arise if the rules were valid. He, however, expressly left open the question as to whether the alteration would be binding on a member who had not assented. His view appears to be that assent bound the member to accept the full effect of the rule at all times in the future, and he treated this as leaving open the question of the validity of the rule. Lord Sumner regarded the evidence as establishing an actual agreement to take further shares contingently on the happening of the events mentioned in the amended rule or, in other words, an agreement made as between the two parties outside the rules that shares would be taken to the extent to which liability would be imposed if the rule were valid, thus avoiding altogether the question of deciding the validity of the rule and expressly warning the House against the danger in these circumstances of leaving the declaration made by the Court of Appeal unamended. This judgment leaves the ground quite clear for raising again the question as to the validity of the rule, and I think that the effect of the Lord Chancellor's opinion might fairly be so interpreted, but the judgments of the other learned Lords appear to me to prevent the possibility of accepting this view. Lord Shaw said that the reasonings of the Court of Appeal were entirely right. As those reasonings only affect the validity of the rule, it must mean that, in his view, the rule was valid, and nothing in the remainder of his judgment affects that opinion. Lord Parmoor says: "Unless, therefore, it can be shown that the rule in question is one which the respondent Society had no power to make, the appellant would be bound to comply with its provisions as a contractual obligation undertaken by them," basing the contract on the validity of the rule. Lord Blanesburgh expresses his agreement with the Lord Chancellor, but says: "I am much struck by the fact that a rule of the nature of that here under discussion seems to be in common use in these societies. . . . I can well believe that regulations of the kind are essential to the successful working of such societies and it would be a serious thing lightly to cast doubt on their validity." And he also thought that the appeal should be dismissed.

The appeal was accordingly dismissed, and it is significant that the qualification which Lord Sumner thought ought to be introduced into the order of this House was omitted. The order as found in the Journal of this House on July 29 is that the appeal should be dismissed, and that left untouched and indeed, in my opinion confirmed, the declaration of the Court of Appeal, that the liability arose under and by virtue of the agreement under Rule 6 of 1918. I find myself constrained in these circumstances to the view that the decision of this House did involve that such an alteration of the rules was valid, and it is so regarded by Lord Hanworth M.R. in the present case; if that is so, it is unnecessary to examine in detail the further arguments on this appeal, presented to show the rules are invalid, because it cannot be disputed that in these circumstances the present rules would be good, subject only to the question as to whether they are void for uncertainty. It is no doubt possible to show that some confusion and difficulty might arise in ascertaining the strict liability under these rules as they stand. That is not sufficient to render them void; I think the calculation could be effected with a reasonable and sufficient certainty, and on that ground I think the rules cannot be challenged.

The judgment of Romer L.J., who tried this case as a judge sitting in the Court of first instance, has examined the

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whole question with such care and, in my opinion, such accuracy, that I should be prepared to accept his judgment as the expression of my own opinion. For these reasons I think the appeal should fail.

VISCOUNT DUNEDIN [after a narrative of the facts.] My Lords, the first question on the result of which the judgment of the Courts below depend, is whether the present case is ruled by *Biddulph's* case. (1) It is therefore necessary carefully to consider what *Biddulph's* case (1) really was, and to see whether the judgment of this House, which is binding on your Lordships, really entails the necessary consequence that the original judgment in *Dibble's* case (2) was wrong in every particular. In *Biddulph's* case (1) the respondents in this House were a Society registered under the same Act as the Society here—namely, the Industrial Act of 1893—and the appellants were another Society also registered under the same Act. I will call them respectively the A and B Society. Now the A Society in its rules contemplated and provided for the case of one of its shareholders being a Society and not an individual, and Rule 9 was as follows: "Shares to be held by members. Each Society or Company which is a member shall hold at least one share for each 50 or fraction of 50 of its members."

The B Company had between 50 and 100 members, and in accordance with that rule took up two shares. There was as here a power of amending the rules. Rule 59 was: "Mode of amending rules. The rules may be amended by resolution of a three-fourths majority at a special general meeting."

The rules were amended. It is not necessary to quote the amendments which are lengthy, but they may be summarized by saying that in the amended form instead of the number of the shares of an admitted society being left as they were on the calculation of the number of members at the time of the admission, the admitted society in the case of its membership being increased had to apply for such extra shares as would make up the number which would have been necessary if the Society had then been admitted to membership for the first time, and in addition for certain shares calculated on the basis of the turnover of the admitted Society. The result of the alteration was that the B Society, in the terms of the new rules, became bound to apply for 470 extra shares. The new rules were brought to the notice of the B Society by a letter from the A Society, and on receipt of that letter, and after certain correspondence, the B Society applied for the extra shares which were necessary on the above calculation, and they were allotted to them and they accepted the shares and paid up the amounts due upon them. Three years later, the membership and turnover of the B Society having further increased, the A Society called on the B Society to apply for and take 2211 more shares. This the B Society refused to do and the A Society raised action. Now it will be at once observed that there was an obvious difference between the facts of that case and this case. In that case the B Society had accepted the situation of the altered rules by applying for shares and accepting them and paying for them. The shares were shares which they needed to apply for either because the new rule was valid or on the assumption that they accepted the alteration of the rule as valid; in the present case no such application, no such acceptance and no such payment was made. It was therefore possible in the Biddulph case for A Society to put its argument on two separate grounds. (1.) That the rule as it stood was binding on the B Society, and (2.) that even if it was not the B Society by application, acceptance and payment under it had contractually adopted the rule in question with the A Society. Now this double ground was undoubtedly pleaded by the A Society, for on p. 772 of the report in the Court of Appeal (1) I find this as the argument of the appellants. (The A Society were appellants before the Court of Appeal, because Lawrence J.'s judgment in the first instance had simply followed his own judgment in the *Dibble* case.) "The appellants' claim is based on two grounds, first that an obligation to take the 2211 shares in question arose under the rules, and secondly, that there was a contract to take them quite apart from the rules. If we succeed in the first claim, the other will not arise."

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(1) [1927] A. C. 76.

(2) [1923] 1 Ch. 342.

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(1) [1925] Ch. 769.

But when we come to the judgment of the learned judges in the Court of Appeal the whole discussion turned on the first ground—on that they were with the appellants—and there is not a word about the second.

The first two judges pass over it in silence, and the third only says he thinks it unnecessary to say anything about it, so he hazards a doubt bearing on the fact of the application. Not a word is said as to the alleged second ground of liability, and not a word as to the possibility or impossibility of imposing a liability not by original or adopted rules, but by rules passed by a majority in virtue of mere power of amendment. The whole argument in the case turned on whether such a rule, i.e., a rule in certain events described imposing a liability to take further shares was or was not struck at by the limitation of liability provisions. Lawrence J. in *Dibble's* case had held that it was. And the whole gist of the judgment in the Court of Appeal was simply this, that the statutory limitation of liability only applies to the liability which arises on a share in respect of that share, and the doctrine has no application to a collateral contract to apply for extra shares in certain events, the liability on those shares being of course limited to the amount due on them. A very few quotations will make this clear.

Sir Ernest Pollock M.R. (1) quoting *Baird's* case (2), says: " 'A member is only liable to be placed on the list of contributories in respect of the amount which by the memorandum of association of the company he has undertaken to contribute in the event of its being wound up' upon his guarantee—it was a company limited by guarantee—' although he may be sued for sums which he is only bound to pay under the articles of association, he is not liable as a contributory in respect of such sums.' There are two different liabilities; so far as he is a shareholder he is placed upon the list of contributories in respect of the unpaid balance due upon his shares;

(1) [1925] Ch. 781.
(2) [1899] 2 Ch. 593.

in so far as he has undertaken an extrinsic liability, he can be sued in respect of that extrinsic liability."

Warrington L.J. says (1) that the judgment of the Court below and the arguments adduced, "ignore the obvious distinction between the limitation of liability in respect of shares held, and an obligation collaterally imposed upon a member to take up further shares which will themselves, when taken up, be entitled to a similar limitation of liability."

Sargant L.J. says (2): "There may be some special collateral liabilities attaching to a share by special contract which are in no way touched or destroyed or affected by the limitation of the liability of a member in respect of the general engagements of the company such as can be enforced in a winding up of the company."

Now I do not doubt that as it left the Court of Appeal that case ruled the point, for it disposed once and for all of the idea that limited liability had anything to do with the question, and it assumed that the rules, unless they were bad as infringing limited liability, were good and binding on the B Company. But when that case came to your Lordships' House all that was altered. Their Lordships undoubtedly affirmed the proposition that the doctrine of limited liability could not save the B Company, but beyond that they did not go. They saw, or at least the majority of them saw, that the question of whether you could impose a liability such as this merely through a power of amendment of the rules, was a very serious question indeed. I have already noticed the arguments of the A Company before the Court of Appeal when their counsel said there were two questions: (1.) Liability in respect of the rules per se; (2.) Liability under contract apart from the rules, and added that if (1.) were solved in his favour (2.) did not arise. In the very first sentence of the judgment of Viscount Cave L.C. he puts the matter quite plainly as soon as he has stated the facts (3) in precisely the opposite order: "It is unnecessary for the purposes of this appeal to decide whether, having regard

(1) [1925] Ch. 786.
(2) [1925] Ch. 794.
(3) [1927] A. C. 84.

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to the terms of the Industrial and Provident Societies Act, 1893, an alteration of the rules of a registered society requiring members of the Society to subscribe for additional shares would be binding on a member who had not assented to the alteration ; for the case of the respondents rests, not on any alteration of rules made after the appellants took up their shares, but on the rules of 1918, which were in force when the appellants subscribed for 470 shares. . . . . The respondents' case rests on contract only. The appellants when they took the 470 shares on the basis of the rules of 1918—and the correspondence shows beyond any doubt that they did so" (this quiets the hinted doubt of Sargant L.J.)—" became by virtue of section 22 of the Act of 1893 bound as by a covenant under seal to take further shares in accordance with the provisions of those rules ; and there is nothing in the Act of 1893 or to be inferred from that enactment which invalidates such a covenant." And then at the end he does not say that *Dibble's* case (1) is overruled, which is what the Court of Appeal said, but he says so far as *Dibble's* case (1) is inconsistent with the decision (not, observe, the reasons) of the Court of Appeal in this case I think that it must be deemed to be overruled. In other words what the Lord Chancellor clearly held was this ; the judgment below is right in so far as it holds that a provision of this kind imposing liability in certain events to take further shares is not inconsistent with limited liability, and is therefore a good provision in the original rules of any such society. And the question does not arise whether it could be introduced under cover of a mere right to amend because the appellant, having seen the rules altered, did not say they are not binding on him, but acquiesced and contractually bound himself on the altered rules just as he would have been contractually bound under the original rules.

Lord Sumner held the same view after setting forth what had taken place in 1918. He said (2) : " I think that the appellants impliedly accepted the amendment of 1918 and agreed to perform it, as circumstances might arise from time

(1) [1923] 1 Ch. 342. (2) [1927] A. C. 88.

to time, and that this obligation became contractually enforceable upon them by action."

Lord Blanesburgh (1): "I too think that this appeal should be dismissed, and I am in entire agreement with the reasons for that conclusion which have just been given by the Lord Chancellor."

It is true that in one of the three observations which he permits himself to make it looks as if he might have been content to rest his judgment on other grounds rather than those of the Lord Chancellor, which he had formally accepted, but that this is not so is I think shown by his very last remark. When alluding to the arguments that in the case of a limited company by means of an amendment in the articles of association the door would be open to get round limited liability in cases under the Companies Act, he says: "I have no fears on that score. I cannot see that anything now decided by your Lordships is even remotely connected with these matters, or any of them." Now if the case had been left as the Court of Appeal left it, this would have been the inevitable result, and it is that which, to my mind, makes this case so very important. For if the idea that any alteration made under a power to alter constitutes a collateral contract which has nothing to do with the principle of limited liability is affirmed as it stands, then why should not a limited company, having in its articles the power to increase its capital, pass another article which provided that in the case of, say, one-fourth of the capital being lost, it should be incumbent upon the shareholders to apply for such a number of shares as would make up their proportional share of the capital lost, and this operation might be repeated from time to time.

Lord Shaw's judgment is, with deference, lacking in the usual precision of that learned judge. He begins by seeming to reserve the general question, but he goes on to affirm simpliciter, the judgment of the Court of Appeal.

Lord Parmoor clearly does the same, but these two are in a minority as regards their reasons.

(1) [1927] A. C. 93, 94.

My first point therefore is that the judgment of the Court of Appeal was wrong in saying that this case was ruled by *Biddulph's* case. (1) That leaves it open to discuss the case on the merits, but first let me say what I think has been decided by *Biddulph's* case (1) and the cases which were cited in it.

First it was decided that a rule of this kind if it took its place among the original rules, or was assented to as a new rule, was not bad in itself as being struck at by the provisions for limitation of liability, and secondly it was decided that such a rule was not bad because it prescribed an expanding liability to take extra shares, inasmuch as it gave a method by which that expanding liability could be accurately calculated. But when we come to the question of admitting a rule of that kind for the first time only by virtue of a general power of amendment, all seems to me to be altered. You are then supposed to be under a contract to be bound by any extension of your liability which a three-fourths majority may enforce without any power of prescience as to what form that liability may take. Take the present case. If, instead of the 5*l.* nominal value the rule had said 100*l.*, it would be all the same. I therefore come most determinately to the conclusion that a contract to take extra shares and incur extra liability, which is not set forth but only introduced through a general power of the amendment of the rules, is too vague to be enforced and is bad at common law.

When the learned counsel for the respondents realized that it was not at all certain that your Lordships would take the same view of what was settled by *Biddulph's* case (1) as the Court of Appeal had taken, he proceeded with great ability and persistency to produce certain cases which he argued supported the judgment even upon the assumption that the matter was not concluded by *Biddulph's* case (1), and it is right that I should deal with these authorities.

None of them, in my opinion, support what was here done. None of them are actually binding on me, for they are not judgments of this House, but being judgments of very

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(1) [1927] A. C. 76.

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eminent judges I would be loath indeed to say that such judges as Lord Lindley, Lord Bowen and Fry L.J. were wrong. At the same time I confess I find it difficult to reconcile the cases I am going to quote with the case of *Auld* v. *Glasgow Working Men's Building Society* (1), and the opinion of Lord Halsbury therein. But I need not further inquire as to this as in my view they can be distinguished from this case. Some of them, such as the pigeon shooting case, are plainly inapplicable, for there is here no question of changing the general nature of the society, so I go at once to what, on the face of it, seemed the best authority—namely, *Rosenberg* v. *Northumberland Building Society* (2), and the case therein cited of *Wilson* v. *Miles Platting Building Society.* (3) But before I discuss that case I would mention a case which, though posterior in date, contains the principle on which, in my opinion, the other case is decided. I mean the case of *Strohmenger* v. *Finsbury Permanent Investment Building Society.* (4) That was a case where a new rule simply reduced the capital of the company. Lindley L.J. says: "The reason why that rule was passed is perfectly intelligible. The Society had sustained a loss of about 30,000*l*. . . . . The money had gone. How was the loss to be dealt with? The members considered the matter, and came to the conclusion that the most expedient way of dealing with the case and the fairest way for everybody was to reduce the shares. There is nothing dishonest about that—no cheating of creditors."

Now it is apparent that this was merely doing at once what would have been automatically done had the Society been wound up. Each member of the Society is treated alike. The capital in the Society was his capital and it was partly gone. All that was done was to show at once by restating the debt of the Society to each member, that the capital had pro tanto been lost. Now that was to my mind just what was allowed in a more complicated form in the cases of *Rosenberg* (2); *Wilson.* (3) Both these cases dealt with the rights of advanced members in a building society.

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(1) (1887) 12 App. Cas. 197.
(2) (1889) 22 Q. B. D. 373.
(3) (1887) 22 Q. B. D. 381n.
(4) [1897] 2 Ch. 469, 477.

The scheme of a building society is that the contributions form the building up of the share capital which then becomes a debt to the member owning the shares. An unadvanced member, if the matter is allowed to go on so to the end, gets back his share in the shape of money and interest, but the advanced member is one who gets an advance to build a house. The advance is finally to be repaid by the maturing of his share, but as security to the Society he executes a mortgage on the house. These mortgages contain a covenant by the mortgagor to pay to the Society all subscriptions, fines and other moneys which, according to the rules for the time being of the Society, and from time to time, become due and payable by him in respect of the security or the shares by virtue of which the advance was made to him. In the rules in force at the time of the execution of the mortgage, there was no provision that advanced members should bear their proportion of any losses which the Society might sustain. This was altered by a rule duly carried and the question was whether the mortgagor could redeem without bearing his proportion of the loss. It was held he could not. Now it will be noted that the amount to be found in money in order to redeem the mortgage was the total sum due minus the value of the share at the moment of redemption. That value was liable to be reduced by a rule allocating losses against shareholders, and that is why I quoted the *Strohmenger* case (1) first. The point of these cases was that the mortgagor had no right to be treated as an ordinary mortgagor, that is to say, at arm's length from the mortgagee, and that he was primarily a shareholder and only secondly a mortgagor. Fry L.J. says this definitely (2). "It is obvious that the position of a mortgagor in the case of a mortgage to a building society is by no means the same as that of an ordinary mortgagor, and that his rights must be more or less affected by the contract of membership, as well as by the contract of mortgage. It is equally apparent, I think, that the contract of membership carries in gremio the right on the part of the Society to alter the rules from time to time."

(1) [1897] 2 Ch. 469. (2) 22 Q. B. D. 380.

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And that alteration being an alteration of the character which I have explained in the *Strohmenger* case (1), was a good alteration. But that does not touch the general proposition which we have here of an alteration being made which did not simply affect the rights of the member in the capital of the Society, but imposed a perfectly new and outside liability upon him.

For these reasons I am of opinion that this appeal should be allowed and I move accordingly.

VISCOUNT SUMNER (read by LORD MACMILLAN). My Lords, the importance of this case in its legal aspect consists in the question raised by the very able argument for the respondent, which was virtually a claim, that an association, registered under the Industrial and Provident Societies Acts, can, by the exercise of its power to make regulations and to alter or rescind them, compel members to invest capital in its business against their will without, so far as I can see, any limit at all.

The effect of the alterations made in the present case was in substance (1.) to write down the nominal value of the shares, which the appellant held and had paid up in full, to one-third of their original value, and (2.) to require and oblige him, if possible, to take from the Association and to pay for a number of further shares depending on the acreage of his holding or the number of dairy cows that he owned from time to time, whichever might be more favourable to the Association. Such a drastic reduction of capital shows how severe and probably how irrecoverable the trading losses of the Association had been in the past, and further writing down of old shares and requiring members to take up new ones were processes which, in case of need, might be repeated as often as might be necessary in the future. The formidable character of the power in question is manifest. Not only is it an express discrimination between members of a greater and members of a less apparent capacity to pay, but the Association, faced with a declining business and pressing creditors, would be enabled to extract from members, who

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(1) [1897] 2 Ch. 469.

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happened to be milk producers and whose herds and acreage were not declining, further and further sums until they were reduced to extremity. It is true that the regulations in question were all regularly and duly passed and that the majority which the rules required must therefore have been obtained; but in a Society, many of whose members may have remained at least stationary in the size of their farms and herds or who may not have been milk producers at all, such provision, applied to such conflicting interests, might be no protection to persons in the appellant's position.

To support a claim to such a power either clear judicial authority, clear legislation or clear principle and necessity would seem to be required. In my opinion none were forthcoming. Courts have naturally gone far to support the autonomy of social clubs and their power to affect members by rules and resolutions, passed regularly and in good faith, but no case was cited even approaching a financial power of this sort. Building society cases again were cited, of which I think it is enough to say that none went so far as the present case, precisely because none were characterized by the peculiar features to which I have drawn attention. Neither does the authority of cases as to mutual marine insurance associations apply, for these are cases of collateral undertakings ancillary to the regular business of the association and bearing equally upon all members. The present case is far otherwise. The scheme and structure of the Industrial and Provident Societies Act, 1893, were rightly stressed, for they are indeed important, and it may be truly said that they appear in general to be designed to authorize the formation of associations for the purposes described and thereafter largely to leave them to manage their own affairs as they might think fit, but even here s. 4 (*a*) and s. 60 (*d*) seem to show sufficiently that the Legislature did not intend members to be at risk in such a way as might result from these amended regulations. As to finding a foundation for the contention in principle or necessity, I think the matter is quite the other way. I throw no doubt on the good faith either of those who managed the Association or of those who voted for these amended resolutions, but, speaking purely in a legal sense, I think the contention unprincipled.

It remains to refer to the decision in the *Biddulph* case (1), by which, of course, your Lordships are bound. I concur in the opinion, which I understand to be that at which all your Lordships have arrived. Your Lordships dissented from the ground on which *Dibble's* case (2) had been decided in the Court of first instance and put that case aside, but in so doing did not decide that the actual rules there impugned and others like them must therefore be unexceptionable. It appears to have been the opinion of the majority that, even apart from an express bargain, evidenced in the correspondence and taking the form of an offer and an acceptance of the new shares, the rules then in question had received such a measure of assent from the complaining shareholder as prevented him from refusing to comply with them. To make this decision of use to the respondent in the present case, where it is clear that no assent was ever given by the appellant either originally or at all, it was contended that their Lordships' ratio decidendi was that the rules in question belonged to a class (not anywhere described or elsewhere even suggested), intermediate between rules ultra vires and rules intra vires simpliciter, which though valid in themselves were conditional, for their operation as rules, on some assent given by the individual shareholder. This condition, it was said, having been satisfied in fact, the rules, which in themselves were good throughout, became also operative and then stood on the same footing as all other valid rules. I have not been able to persuade myself that such was the real meaning of any of their Lordships. Nothing in the language of the rules in question suggested any such condition or indicated any such ambiguous category. On their face they were unconditional and stood or fell like all other rules by the extent of the Association's power. If the ratio decidendi was that the respondent's present contention, which was then also advanced and on the same grounds, ought to be supported, not only would this have been said in clear terms but there would have been no need and no inducement to have said anything more. I do not think that the *Biddulph* case (1) binds your Lordships in any degree to support the respondent's present argument; on the contrary, so far as it affects this case, it shows that no noble and learned Lord then concerned could find it supportable.

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(1) [1927] A. C. 76.

(2) [1923] 1 Ch. 342.

For the other points raised I may say briefly that the rule attacked as uncertain and void seems to me to be clear enough, subject to proof of some simple facts in each case, though in its operation it may be arbitrary and unreasonable. It may be a bad rule but it is not a void one. As to the question, whether the contention of the respondents should not have been raised in an action for damages against the appellant for not applying for shares to be allotted by the Association, instead of on a liquidator's summons to place him on the list of contributories in respect of shares that he never held, I think, in the view I have already taken, that it is unnecessary that this point should be considered, all the more because it is not one that the respondent could have gained any advantage by urging in the first instance, or that interferes with a decision now on other grounds.

I think that the appeal should be allowed.

LORD ATKIN. My Lords, I have had the opportunity of reading the judgment delivered by Lord Dunedin and that about to be delivered by Lord Tomlin, and I agree with the reasons contained in them. I content myself, therefore, with a statement of my principal ground for differing from the decisions below.

Apart from any decision which binds your Lordships to the contrary view, I should have thought on principle that the matter was fairly plain. If a man enters into association with others for a business venture he commits himself to be bound by the decision of the majority of his associates on matters within the contemplated scope of the venture.

(1) [1927] A. C. 76.

But outside that scope he remains dominus, and cannot be bound against his will. The principle is seen in its simplest form in connection with partnership. I quote from the edition of Lindley on Partnership, 5th ed., in 1888, published before the Partnership Act, at p. 315, Bk. III., c. 2, s. 3: "Passing now to the second class of differences, namely, those which relate to matters with which the partnership was never intended to concern itself, it has been over and over again decided that no majority, however large, can lawfully engage the partnership in such matters against the will of even one dissentient partner. Each partner is entitled to say to the others: 'I became a partner in a concern formed for a definite purpose and upon terms which were agreed upon by all of us, and you have no right, without my consent, to engage me in any other concern, nor to hold me to any other terms, nor to get rid of me, if I decline to assent to a variation in the agreement by which you are bound to me and I to you.' Nor is it at all material that the new business is extremely profitable. This principle is applicable to all partnerships and companies, whether great or small, and is evidently one which requires only to be stated to be at once assented to as being just." The author proceeds to cite *Natusch* v. *Irving* from Gow on Partnership, ed. 3, App. 398. In that case a company formed for carrying on the business of fire and life insurance proposed on the withdrawal of a statutory prohibition to engage in marine insurance. The plaintiff held 15 shares out of 50,000 and objected, and Lord Eldon granted him an injunction. With respect to the powers of a majority, Lord Eldon said: "If six persons joined in a partnership of life assurance, it seems clear that neither the majority nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power: because if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent." He went on to say that if, however, the proposed change was made known to the others, and he acquiesced, he would be bound. As to partnership the principle is now expressed in ss. 19 and 24, sub-s. 8, of the Partnership Act, 1890. Amongst the matters in respect of which the individual does not agree to be bound in invitum appear to me to be the purposes of the association, and the amount of money which he will contribute to his associates for those purposes. I am not, of course, dealing with liability to third parties. These matters, generally speaking, I regard as fundamental. And unless there is reasonably clear indication in contractual terms, or statutory provisions that the individual member is to be bound in these respects against his will, his right to remain unaffected will continue. There may, therefore, be important distinctions between the binding force of original stipulations to which the member has assented, and of purported alterations of the original stipulations to which alterations he has refused assent. I venture to think that the judgments of the Court of Appeal in *Biddulph's* case (1) have not paid sufficient attention to this distinction, and have relied too much on authorities which, so far as they do support the decision, are instances of original stipulations to which the party in question had given his assent. No doubt need be thrown upon the proposition that a member of an association may undertake, in addition to his contribution to the joint venture, collateral obligations such as are involved in a mutual insurance of such of the members' chattels as they individually are allowed to bring into the scheme. The Master of the Rolls finds some analogy in the present case to such an obligation. With respect there is nothing here corresponding to such mutual obligations. The society no doubt buys from outside and sells to its members; buys produce from its members and sells outside; it may also buy from one member and sell to another; but all these transactions are different in principle from mutual insurance, and in any case involve no obligation on a member to buy or sell anything against his will, still less to apply and pay for a share which he does not desire.

(1) [1925] Ch. 769.

The only relevant question in this case appears to me to be whether r. 64 giving the power to a three-fourths majority at a special general meeting to amend the rules confers a power to amend those rules in respect of the fundamentals above mentioned so as to bind a dissenting member. I think that the consent of a member to such a rule as r. 64 is not an assent to have the purposes of the society or the amount of his share subscription altered against his will. Full effect is given to the rule by limiting its operation as against dissentients to matters which are within the scope of the administration of the venture as originally framed. I should myself regard as within this definition such matters as the annual subscription to a social or other club which may fairly be regarded as a matter of internal administration. But an increase in capital contribution is something quite different. I reserve the question whether an amended rule so passed is ultra vires the society so as to be entirely void and therefore not binding on even the assenting majority. It may well be that a society under this Act can only express in rules what I may call offers of fundamental change, and that such rules so far as they are assented to, but only so far, bind assenting members. This seems to be the view entertained by Lord Cave in *Biddulph's* case. (1) If such amendments are indeed enforceable to the full extent the present case shows the far-reaching consequences. So far as I can see it would be within the power of an optimistic majority to continue indefinitely to trade at a loss. Each time the Society approaches insolvency it need only write down its shares to a nominal sum and by amending the rules impose obligation upon all the members to make further contributions of share capital. As long as the obligation did not exceed 200*l.* per member this process in theory could continue without limit. I do not find it necessary to discuss similar problems arising under the Companies Acts or other statutory enactments regulating such association. It will, I think, be found that the fundamental matters I have referred to are carefully guarded by

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(1) [1927] A. C. 76.

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interposing the consent of the Court or otherwise. Certainly I should be surprised to find that by amendment of the articles of association existing members could be compelled to subscribe to further issues of authorized capital. Such a simple device appears to have escaped the attention of company financiers. But it will only be necessary to consider such a proposal when, if ever, it is made.

The only remaining question is whether we are precluded by the decision of this House in *Biddulph's* case (1) from giving effect to these conclusions. My Lords, for the reasons given in the judgments to which I have referred, especially of Viscount Dunedin, I am myself satisfied that the reason for the decision of the majority of the House in that case was that the appellants were bound by actual assent to the proposed alteration of the rule. I might add to what has been said that I can only construe a passage in Lord Shaw's judgment at p. 86 in which he says that "the appellant society stood bound since March, 1919 . . . . to the rules of the society in force at that date" as an indication that he also rested on express contract, for the amendment in question had been made in May, 1918; and the date of March, 1919, is the date on which additional shares had been allotted to the appellants on their application made with notice of the amended rule. I am not pressed with the fact that the House did not alter the declaration made in that case by the Court of Appeal. I am inclined to think that the terms of the declaration support either view; but in any event I conceive that your Lordships are bound not by the precise form of a judgment which is indeed conclusive between parties, but by the reasons given declaring the law upon which the formal judgment is drawn up.

I desire to add that I share the doubts expressed by Lord Tomlin as to the procedure adopted in this case, and as to the suggested measure of damages.

For these reasons, my Lords, I agree that the appeal should be allowed, and the order made in the form proposed by Lord Tomlin.

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(1) [1927] A. C. 76.

LORD TOMLIN (read by LORD THANKERTON). My Lords, the question to be answered in this case is whether the appellant by reason of amendments in the rules of the Society not assented to by him is liable to be placed upon the list of contributories in the winding up of the Society.

To answer the question it is necessary, first, to consider what is the bearing on the matter of (*a*) the decision of Lawrence L.J. (then Lawrence J.) in *Dibble* v. *Wilts and Somerset Farmers, Ld.* (1), and (*b*) the conclusion of your Lordships' House in *Biddulph and District Agricultural Society* v. *Agricultural Wholesale Society.* (2)

Upon these topics there has been much debate before your Lordships and I desire only to say that my understanding of the latter case is that in it a majority of your Lordships' House reached a conclusion to the following effect—namely (1.) that the appellant in that case was bound by a contract personal to himself to take up additional shares so that the necessity for passing an opinion upon the validity of the amendments of the rules did not arise, and (2.) that *Dibble's* case (1) was overruled so far only as it was therein held that an obligation under the rules to take up further shares is necessarily bad having regard to the statutory limitation of liability to contribute in a winding up.

It follows in my view that it is open to your Lordships in the present case to consider how far the amended rules are valid and binding on the appellant.

My Lords, the analogy which in the course of the argument was sought between a limited company under the Companies Acts and a society registered under the Industrial and Friendly Societies Act, 1893, is apt to be misleading.

A limited company is created and regulated by statute. Its capital is fixed and cannot be reduced except on special grounds and with the sanction of the Court. Its powers are circumscribed by the terms of the memorandum of association. The memorandum cannot be altered except for certain purposes and then only with the sanction of the Court, which

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(1) [1923] 1 Ch. 342.

(2) [1927] A. C. 76.

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is bound to consider the interest of the members. Nor can any alteration of the articles of association be made so as to enlarge the powers conferred by the memorandum. The company's continuance on the register is necessary to its existence.

A society registered under the Act of 1893 is in a different position. The Act confers, subject to certain conditions and so long as registration lasts, corporate existence and other privileges upon a society formed for carrying on any industries, businesses or trades specified in or authorized by its rules. The preamble to the earlier Act of 1852 indicates the kind of societies for which the Legislature was seeking to provide. The Act of 1893 does not require that the constitution of the society should, on registration, be regulated more closely than may be done by including in the registered rules provision for certain matters specified in that behalf in the Act. The specified matters do not contain any reference to the amount of capital or the manner in which the rules may be altered. They include, " Determination of the amount of interest not exceeding 200*l*. sterling in the shares of the society which any member other than a registered society may hold." The rules of a registered society bind the society and all members thereof as if each member had subscribed his name and affixed his seal thereto and there were contained in such rule a covenant on the part of such member to conform thereto subject to the provisions of the Act: see s. 22. The registration of a society may be cancelled or suspended. Such cancellation or suspension does not destroy the society, but only deprives it of and relieves it from the privileges and obligations which follow from registration. It can continue its existence so long as it does not infringe the provisions of s. 1, sub-s. 2, of the Companies Consolidation Act, 1908.

It results from these differences between a limited company and a registered society that the considerations which determine the question whether a member is bound by alterations in the constitution are not identical in the two cases, at any rate where as here the matter does not depend upon the element of fraud or bad faith.

In the case of the limited company the answer will be found when it has been ascertained whether or not the limitations and formalities imposed and required by the Acts have been adhered to and complied with.

In the case of a registered society, inasmuch as the operation of the statute is limited, it is necessary to consider, first, whether the amendments offend against any of the statutory provisions and, secondly, whether, having regard to the general principles governing contracts inter partes, the amendments are effective as against members who have not assented to them.

An examination of the relevant amendments in the present case does not in my opinion disclose anything obnoxious to the statute. If the amendments had stood as part of the original rules they could not I think have been impeached, and from the point of view of the statute that which would be innocent as an original rule cannot be invalidated merely because it is embodied in an amendment.

There is however the second consideration. Does a power enabling a majority to amend the rules justify as against a dissenting member any alteration whatever, where, as here, neither by the statute nor by the rules themselves is any one rule expressed to be more fundamental and unalterable than any other ?

The answer in my judgment must be in the negative. In construing such a power as this, it must, I think, be confined to such amendments as can reasonably be considered to have been within the contemplation of the parties when the contract was made, having regard to the nature and circumstances of the contract. I do not base this conclusion upon any narrow construction of the word " amend " in Rule 64, but upon a broad general principle applicable to all such powers.

If no such principle existed I see no reason why a dairy society in Wiltshire should not by means of the exercise of such a power as the one under consideration find itself converted into a boot manufacturing society in Leicester with an obligation on the members to contribute funds to the new enterprise.

What changes then do the amendments in the present case effect?

In the first place they impose for the first time upon a new and limited category of members—namely, milk producers, a special liability to hold shares in the society. In the second place their effect in substance if not in form is to compel the members within the first part of Rule 12 to pay over again for two-thirds of the nominal value of their original shares and at the same time, while depriving them of their right to interest under Rule 15 on their original payment of such two-thirds, to keep within the letter of Rule 13 in the case of members whose original shares already amount to 200*l.* in nominal value. It is also to be observed that the alteration made in Rule 23 on November 14, 1921, renders it impossible for any member without the consent of the committee of management to escape from the obligations imposed by the other amendments.

If the scheme embodied in these amendments for extracting money from the members is legitimate, the potential liability of each member in a society registered under the Act of 1893 is without limit and has no relation to what was within his contemplation at the moment of joining the society.

It is said that the society is free to reduce its capital and to increase its capital and that this is what it has done.

It has in fact done much more. It has discriminated between members and has laid on members an obligation to hold more shares. It has no special statutory authority to do this. It can only do it if the power to amend the rules justifies it as a matter of contract.

In my opinion the power does not justify it. I do not think that it is within the contemplation of the parties to a bargain of this kind that they should be made liable for a compulsory levy or expenditure over and above the contributions payable or to become payable under the original terms. On the contrary I think the basis of such a bargain is that the extent of the member's liability is limited by the original terms and that it cannot be enlarged by any amendment of the rules.

My Lords, I desire to add one further word by way of caution. As at present advised I am not prepared to accept the view that the amended rules as to holding further shares even if binding upon the appellant entitle the liquidator to place the appellant's name upon the list of contributories or that, if the Society's remedy is by way of action for damages, the measure of damages would necessarily be the nominal amount of the shares which ought to have been acquired.

Having regard, however, to the view which I take of this case these questions do not call for answer.

My Lords, for the reasons which I have endeavoured to indicate, I think that the appeal should be allowed and that so far as they affect the appellant, the orders of the Court of first instance and of the Court of Appeal, except in respect of the costs in the Court of first instance, should be discharged and that it should be declared that the amendments, so far as they purport to impose upon the appellant an obligation to hold further shares of the Society, are not binding upon him and that he ought not to be placed upon the list of contributories. The appellant's costs here and in the Court of Appeal should be paid by the liquidator. The costs of the liquidator, including any costs payable by him to the appellant should be provided for out of the assets of the Society so far as they are sufficient for that purpose.

Order of the Court of Appeal, and judgment of Romer J., in so far as the said judgment relates to the appellant, reversed except so far as regards the terms of the said judgment as to costs. Declare that the amendments to the rules of the Wilts and Somerset Farmers, Ld., so far as they purport to impose upon the appellant an obligation to hold further shares of the Society, are not binding upon him and that he ought not to be placed upon the list of contributories. The respondent to pay the costs in the Court of Appeal, and also the *costs of the appeal to this House. The costs incurred by the respondent, as liquidator, in and incidental to these proceedings as well before the Court of Appeal as before this House to be his costs in the liquidation. Cause remitted back to the Chancery Division (Companies) to do therein as shall be just and consistent with this judgment.*

Lords' Journals, March 25, 1930.

Solicitors for the appellant: *Ernest Bevir & Son, for H. Bevir & Son, Wootton Bassett.*

Solicitors for the respondent: *Stephenson, Harwood & Tatham.*

[HOUSE OF LORDS.]

SHOTTS IRON COMPANY, LIMITED . . APPELLANTS;

AND

FORDYCE . . . . RESPONDENT.

H. L. (Sc.)*
1930
April 4.

Workmen's Compensation—Failure to claim within statutory Time—Reasonable Cause—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 14, *sub-s.* 1.

The question whether the facts found by an arbitrator under the Workmen's Compensation Act, 1925, constitute reasonable cause for the failure of the injured workman to give notice of the accident or to claim compensation within the statutory period is a question of law, and therefore the arbitrator's decision on the question is open to review.

In April, 1924, the respondent, while working as a drawer in the appellants' employment, injured the muscles of his back. He immediately reported his injury to the proper officer, who, thinking the injury trivial, did not report it to headquarters. The respondent continued his work as a drawer at full wages, with the exception of a fortnight in September, 1927, for nearly four years, when he became totally incapacitated, and he had since been fit for light work only. His injury took the form of muscular rheumatism in the back and attendant sciatica. In October, 1928, he made a claim for compensation, and until that date the appellants had no knowledge that he intended to make any claim against them. Throughout the whole

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* *Present:* LORD SANKEY L.C., VISCOUNT DUNEDIN, LORD BUCKMASTER. LORD THANKERTON and LORD MACMILLAN.

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period he suffered considerable pain, which he associated with the injury. He did not intend to claim compensation so long as he was able to earn full wages in the appellants' employment. The arbitrator found in law that the respondent's failure to claim compensation timeously was without reasonable cause and refused compensation :—

Held, that the respondent had proved that his failure to make a claim within the statutory period was occasioned by mistake or other reasonable cause.

Decision of the Second Division of the Court of Session in Scotland 1929 S. C. 813 affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (1) reversing a determination of the Sheriff-Substitute of Lanarkshire upon a case stated by him as arbitrator under the Workmen's Compensation Act, 1925.

The facts set out in the stated case, in which the words "appellant" and "respondents" refer respectively to the present respondent and the present appellants, were as follows :—

(1.) On April 2, 1924, the appellant, while working as a drawer with the respondents, racked and injured the muscles of his back in assisting to replace a derailed hutch of coal.

(2.) The same day he reported his injury to the fireman, and proper official of the respondents to receive such notice.

(3.) The fireman, considering the injury trivial, did not report it to the under-manager of the colliery.

(4.) The appellant (with the exception of a fortnight from September 16, 1927, when he remained off work for medical treatment at his home) continued in the employment of the respondents at his usual occupation, earning full wages, until March 15, 1928, when he left their employment to undergo medical treatment for trouble arising from his said injury.

(5.) He became a patient of the Royal Infirmary, Glasgow, where, besides other treatment, he underwent, in October, 1928, an operation on the lower part of his spine.

(6.) He suffers from muscular rheumatism in the lower part of his back and attendant sciatica in his legs, and such trouble is due to the effects of his said injury.

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(1) 1929 S. C. 813.

(7.) He was wholly incapacitated for work from March 15, 1928, until January 21, 1929, and since then he has been fit for light work.

(8.) The appellant made no claim for compensation within the statutory period.

(9.) The appellant throughout all material times suffered considerable pain and discomfort, and all along from the date of his accident he and his medical adviser associated his trouble with his injury.

(10.) He did not intend to claim compensation so long as he was able to earn his full wages in the employment of the respondents.

(11.) He claimed compensation in or about October, 1928.

(12.) The respondents had no knowledge, actual or imputed, of the intention of the appellant to make a claim for compensation against them prior to October, 1928.

The arbitrator found in law that (1.) the said injury to the appellant was the result of an accident arising out of and in the course of his employment with the respondents; (2.) his failure to claim compensation timeously was without reasonable cause; and (3.) he was accordingly barred from recovering compensation. He therefore refused to award compensation, and found no expenses due to or by either party.

The question of law for the opinion of the Court was whether in the foregoing circumstances the arbitrator was right in refusing to award compensation to the appellant on the ground that he was barred from recovering compensation in respect that there was no reasonable cause for his failure to claim compensation timeously. (1)

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(1) Sect. 14, sub-s. 1, of the Workmen's Compensation Act, 1925, provides:—

"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death:

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The Second Division by a majority (the Lord Justice-Clerk, Lord Ormidale and Lord Anderson; Lord Hunter dissenting) answered this question in the negative.

1930. March 24. *Right Hon. A. M. MacRobert K.C.* (of the Scottish Bar) (with him *J. G. M'Intyre* (of the Scottish *Bar*), and *Harold Beveridge* (of the English Bar)) for the appellants. The respondent has not discharged the onus which lay upon him of proving that his failure to make a claim within the statutory period was occasioned by mistake or other reasonable cause. He has never suggested that he regarded his injury as trivial or that he was under any mistake as to its seriousness. The fact that a workman, in spite of pain and discomfort, continues, for reasons of his own, to do his usual work at his usual wage does not relieve him from the necessity of electing whether or not to make a claim within the six months following the accident: *Lingley* v. *Thomas Firth & Sons, Ld.* (1); *Atherton* v. *Chorley Colliery Co.* (2); *Webster* v. *Cohen Brothers.* (3) The Scottish cases of *Millar* v. *Refuge Assurance Co.* (4); *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (5); *Flood* v. *Smith & Leishman* (6); and *Livingstone* v. *Summerlee Iron Co.* (7) are distinguishable on the ground that the workman was, or that the arbitrator was entitled to find that he was, under an honest misapprehension as to the seriousness of his injury. "Reasonable

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"Provided that—

"(*a*) The want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if the employer is proved to have had knowledge of the accident from any other source at or about the time of the accident, or if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect or inaccuracy, or that such want, defect or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

"(*b*) The failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

(1) [1921] 1 K. B. 655, 664, 671, 672.

(2) (1926) 19 B. W. C. C. 314, 323.

(3) (1913) 6 B. W. C. C. 92, 95, 97, 100, 101.

(4) 1912 S. C. 37.

(5) 1913 S. C. 217, 223.

(6) 1915 S. C. 726.

(7) 1922 S. C. 272.

cause," it is submitted, is an inference of fact to be drawn by the arbitrator from the circumstances of the case. Therefore the question is not whether the arbitrator was right in his conclusion, but whether he was entitled to come to that conclusion, and consequently there is no power to review his determination if there is any evidence to support it. There is some difference of judicial opinion on the subject. In *King* v. *Port of London Authority* (1) three of the learned Lords—namely, Lord Birkenhead, Lord Finlay and Lord Atkinson—regarded the question of reasonable cause as a question of fact; Lord Parmoor and Lord Wrenbury, on the other hand, thought it was a question of law, and that was also the view taken by the Court of Appeal in *Hillman* v. *London, Brighton and South Coast Ry. Co.* (2) Assuming, as the arbitrator thought, that this is a question of law, the arbitrator was right in refusing compensation.

Fenton K.C., *G. R. Thomson* (both of the Scottish Bar) and *G. L. Burgess* (of the English Bar) for the respondent were not called on.

The House took time for consideration.

1930. April 4. Lord Sankey L.C. My Lords, this is an appeal from a judgment of the Second Division of the Court of Session in Scotland pronounced upon an appeal at the instance of the present respondent by way of a stated case under the provisions of the Workmen's Compensation Act, 1925. [The Lord Chancellor set out the case in full and read sub-s. 1 of s. 14 of the Act.] The Second Division of the Court of Session (The Lord Justice-Clerk, Lord Ormidale, Lord Anderson; Lord Hunter dissentiente) held that the failure of the workman to make a claim within the said period of six months was occasioned by mistake or other reasonable cause.

On the appeal from that judgment to this House it was first argued on behalf of the employers that an appeal was not competent because the question was one of fact, and

(1) [1920] A. C. 1.

(2) [1920] 1 K. B. 284, 288.

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there was evidence which justified the finding of the Sheriff-Substitute.

With this contention I am unable to agree. As Lord Parmoor said in *King* v. *Port of London Authority* (1): " No doubt the relevant facts should be found by the learned judge, and then it becomes a question of law whether these facts are such as to constitute a reasonable cause within the provision of the statute." That decision was followed by the English Court of Appeal in *Hillman* v. *London, Brighton and South Coast Ry. Co.* (2), where Warrington L.J. said: " The facts are sufficiently found by the judgment of the county court judge, and are not in dispute. It is now open to us, if we think that the county court judge has from those facts drawn the wrong conclusion of law, to reverse his decision." In my view, the question whether the facts as found amount to reasonable cause is one of law.

Once again I should like to protest against the great number of cases which are so often cited upon this Act. I prefer to go back if possible to the words of the statute and not to consider such words through a vista of decisions, most of which deal with the facts in the particular case under consideration. I entirely agree with what was said by the Lord Justice-Clerk in this case (3): " One would have thought that the question whether reasonable cause existed for abstaining from making a claim, under any set of circumstances, presented prima facie a simple problem for solution. That, however, is not so, and the problem is, if I may say so, rather obscured than illumined by the mass of case law by which it is surrounded, if not submerged." As, however, we were pressed to consider several of these cases, I will refer to them for the purpose of distinguishing them from the present one.

One fact stands out above all others in the present case, and that is that the workman here worked for four years after the accident—that is from April 2, 1924, till March 15, 1928—at his usual occupation, that of a drawer, and was earning full wages for full work. In *Webster* v. *Cohen Brothers* (4)

(1) [1920] A. C. 1, 31.
(2) [1920] 1 K. B. 284, 288.
(3) 1929 S. C. 813, 818.
(4) 6 B. W. C. C. 92.

the facts were quite different. The workman knew that he was seriously injured; he had to keep resting; his foot gave him great pain and frequently gave way under him. In *Lingley* v. *Thomas Firth & Sons* (1) the workwoman knew that she had been seriously injured, but concealed the fact from her employers and, as the Master of the Rolls, Lord Sterndale, says: "the poor woman did not wish to make any claim or to do anything that would interfere with the very profitable employment in which she was working. She hoped to get better; unfortunately her hope was disappointed." In *Atherton* v. *Chorley Colliery Co.* (2) the workman knew that the accident was so serious that the least touch would bring him to the ground, and he required assistance to do his work.

The facts of these cases differ widely from the facts in the present case. I do not think it is possible—certainly I do not think it is desirable—to endeavour to formulate any rule for guidance in future cases, which must depend mainly on their own facts, and I desire "to guard against the dangerous ambition of wishing to regulate and to foresee everything."

If I may be allowed to say so, I think the best statement on the law on this point is that by Lord Dunedin in *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (3), where he says: "A man may have an accident, and honestly believe at the time that nothing serious has happened to him, and therefore, not conceiving that he has a good claim against his employer, make no claim, but if it afterwards turns out that he has made a mistake in fact and really has been injured, that may be . . . . reasonable cause for his not making the claim within the six months." With that proposition I entirely agree, and I think it covers this case. It will be observed that the colliery official to whom the injury was reported considered it trivial and did not report it to the under-manager of the colliery. The respondent, although he suffered considerable pain and discomfort, worked for years at his hard manual labour, and was able to do it, with the exception of a fortnight

(1) [1921] 1 K. B. 655, 665.
(2) 19 B. W. C. C. 314.
(3) 1913 S. C. 217, 223.

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in 1927, when he remained off work for medical treatment at his home. He was not given a light job at his old rate of wages, but he continued to work and was able to work for that prolonged period and earn his full rate of wages. Over and above that, when the case came on for trial before the Sheriff-Substitute it was suggested for the company that the man's trouble was due to some pre-natal abnormality about the shape of his fifth spinal root and in no way attributable to any strain.

In these circumstances I am satisfied that he has proved that his failure to make a claim within the statutory period was occasioned by mistake or other reasonable cause. He thought, and was entitled to think under the circumstances, and his company's own officer thought, and was entitled to think, that the accident was a trivial one; that nothing serious had happened to him.

In my view the judgment appealed from was correct, and should be upheld.

Viscount Dunedin. My Lords, I concur, and have only two remarks which I wish to make.

I am of opinion that the question of whether a failure to give a notice or make a claim is reasonable or not is a question of law. The facts from which the inference is to be drawn one way or the other must be found as facts by the arbitrator, but the inference that he draws from them is not an inference in fact, but is an inference in law. If therefore the Court of Appeal does not draw the same inference as he has drawn it is right for them to come to the opposite conclusion from that to which he has come. The facts as found on the other hand they cannot touch unless they can go the length of saying that on the face of his judgment he shows that there is no evidence to support them.

The other matter is this. The Lord Chancellor has quoted with approval a few sentences from a judgment of mine in *Ellis's* case. (1) I was not there laying down any criterion. I was giving an example of a position in which it might be

(1) 1913 S. C. 217, 223.

right to find that the omission was reasonable. But when Lord Sterndale M.R. in *Lingley's* case says (1): "Unless the injury from the accident is latent—not at first apparent—or is apparently so trivial that it would be absurd to expect a notice to be given, the failure to give notice as soon as practicable after the accident is not due to mistake or other reasonable cause," he in my opinion by this definition limits too rigidly the inquiry which must be made into the circumstances of each particular case.

LORD BUCKMASTER. My Lords, the difficulty in this case is not due to complicated facts or ambiguous language; it is solely attributable to the imperfections of speech which cause simple words to carry different meanings to different minds.

The respondent on April 2, 1924, strained himself while working for the appellants. He gave due notice of the accident, but he gave no notice of a claim for compensation until October, 1928; the sole question on this appeal is whether there was "reasonable cause" for this delay. The Sheriff-Substitute who acted as the arbitrator thought there was not. The Second Division of the Court of Session, with the exception of Lord Hunter, thought there was. The judgments of the Court of Session are enforced by the consideration of no fewer than sixteen authorities, useful as showing how the critical words presented themselves to people skilled in the art of interpretation and important to guide the judgment of this House, but in only one instance, that of *King* v. *Port of London Authority* (2), are the judgments binding upon us. Nevertheless were the facts here identical with those in any decided case I should feel great hesitation before coming to a conclusion contrary to such an authority; but no such case exists, and I feel therefore free to express my own opinion. In my view the omission to give notice in this case was certainly due to a "reasonable cause." The man himself was unaware of the extent or nature of his injury, and continued his work without marked impediment except for a fortnight in 1927 for nearly four years. The arbitrator finds he suffered pain during this time, but the man was not a shirker and was found to be an honest man ; I do not doubt he sought to make light of his injury. The Sheriff-Substitute says he consulted a doctor in May, 1924, within a month of the accident, and nothing definite was then discovered. On the doctor's advice he was then submitted to an X-ray examination and no definite lesion was disclosed. It is not suggested that he was warned not to work or told that his injury was of a serious character. Nor does it appear that, whatever its nature, it was obvious, because at the hearing it was urged that the incapacity by which he was subsequently overtaken might have been due to some congenital or pre-natal defect.

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(1) [1921] 1 K. B. 655, 664.

(2) [1920] A. C. 1.

In these circumstances to hold there was no reasonable cause for his continuing to work in silence appears to me to put a premium upon malingering. It was not until nearly four years later that the true effect of the injury was known, and it is now established as a fact that his present incapacity is due to the accident which admittedly arose out of and in the course of his employment, but the gravity of which no one recognized at the time.

The case of *King* v. *Port of London Authority* (1) nowhere conflicts with this opinion. Cases under the statute arise in infinite diversity of circumstance, and general rules cannot be laid down for their decision, but I agree with the statement of Lord Dunedin in *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (2), already quoted, and I am not prepared to refine upon it with any dialectical subtleties.

It was at one time suggested in the argument that the question of reasonable cause was one of fact, but this is contrary to authority and to the ordinary rules of construction.

Nor can I accept the view that the question lies in the twilight of debatable ground between law and fact. It is a question for the opinion of the tribunal in each case whether the facts proved constitute a reasonable cause within the meaning of the statute, and the present case proves that such a dispute can proceed to the highest tribunal encountering diverse opinions upon its way.

(1) [1920] A. C. 1.

(2) 1913 S. C. 217, 223.

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I agree with the motion proposed by the Lord Chancellor.

LORD THANKERTON. My Lords, I concur.

LORD MACMILLAN. My Lords, the respondent was injured on April 2, 1924, as the result of an accident arising out of and in the course of his employment with the appellants. He did not make a claim under the Workmen's Compensation Act, 1925, until October, 1928, four years after the expiry of a period of six months from the occurrence of the accident causing the injury. Proceedings for compensation are not maintainable under the statute where a claim has not been made within six months from the occurrence of the accident unless it is found that the failure to make a claim within that period "was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

The learned arbitrator before whom the matter came in the first instance found that the respondent had failed to discharge the burden of establishing a reasonable excuse for his failure to claim compensation within the statutory six months. On an appeal by way of stated case their Lordships of the Second Division of the Court of Session (Lord Hunter dissenting) held that on the facts found by the arbitrator the respondent had reasonable cause for his failure to make a claim within the prescribed time.

The learned arbitrator, after finding the facts, formulated the question of law arising as follows: "In the foregoing circumstances was I right in refusing compensation to the appellant [the present respondent] on the ground that he was barred from recovering compensation in respect that there was no reasonable cause for his failure to claim compensation timeously?" It was contended at your Lordships' bar that this was not the proper way to state the question and that it ought to have been expressed thus: "Was I entitled to refuse compensation?" In support of this contention reference was made to the case of *Livingstone* v. *Summerlee Iron Co.* (1), which arose under the similar provisions of the former Workmen's Compensation Act of 1906. The Lord President (Lord Clyde) there said: "Now, the question that we have to ask ourselves is this and this only; in those circumstances, could the learned arbitrator reasonably arrive at the conclusion that the man ought to have known before the expiry of that period that something serious had happened to him? I admit that, if I had had to decide that question myself, not only should I have been reluctant to arrive at the arbitrator's conclusion, but I doubt very much whether I should have reached it. But that has nothing to do with the question. The learned arbitrator is not shown to have misdirected himself, and the facts found by him were such as entitled him to draw from them the conclusion which he formed." With all respect to the Lord President I think that he proceeded upon a misconception of the function of the Court. He appears to have dealt with the finding of the arbitrator on a question of law as if it were the verdict of a jury on a question of fact. The true position is thus stated by Scrutton L.J. in *Drewett* v. *Britannia Assurance Co.* (1): "The question whether or not he [i.e., the workman] had reasonable cause has been decided by this Court to be a question of law and not of fact, the effect of which is that we are at liberty to reverse the decision of the County Court Judge if we do not agree with him, whereas otherwise we should not be if there was evidence upon which he could come to that conclusion." The question in the present case was not whether the facts found entitled the arbitrator to draw from them the conclusion which he formed, in the sense that there was evidence from which he could so conclude in fact, but whether on the facts found the arbitrator was right in law in his conclusion. There was no doubt evidence on which the arbitrator could find as he did if the question were one of fact, but the question is one of law—namely, whether he was right in so finding—and this question the judges of the Court of Session had to consider and decide for themselves, as your Lordships have now in turn to do.

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(1) 1922 S. C. 272, 275.

(1) (1927) 20 B. W. C. C. 434, 442.

It is impossible to frame a definition of a reasonable cause for omitting to make a claim. Indeed it would be unreasonable to attempt the task. The decided cases on the subject, from the mass of which Mr. MacRobert considerately drew only a few samples, furnish an unhappy instance of history teaching by examples, for the only lesson which they impart is that no one case can govern any other and that each case depends upon its own circumstances.

Your Lordship on the Woolsack has rehearsed and examined the facts of the case before the House and has found that the respondent thought and was entitled to think that his injury was not a serious one and that this mistaken belief on his part furnishes him with a reasonable excuse for not having made his claim within six months. I concur in that view, and would only point out that the respondent may well have entertained the mistaken belief which he did, for not only did he continue to work at his job and earn full wages, but, as the Sheriff-Substitute tells us in his note, which was read by the appellants' counsel, nothing definite was made out on a physical examination by his doctor who saw him in the month following the accident, while a subsequent X-ray examination in the Glasgow Royal Infirmary disclosed no definite lesion.

The appeal in my opinion fails and should be dismissed with costs.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, April 4, 1930.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. & J. Burness, W.S., Edinburgh.*

Agents for the respondent: *Deacon & Co., for Hay, Cassels & Frame, Writers, Hamilton, and Simpson & Marwick, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1930
May 20.

WILSONS AND CLYDE COAL COMPANY, LIMITED . . . . APPELLANTS;

AND

FLYNN . . . . RESPONDENT.

Workmen's Compensation—Industrial Disease—Miners' Nystagmus—Date of Disablement—Certificate of certifying Surgeon—Finality—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-ss.* 1 *and* 2.

The certificate which a workman must obtain from the certifying surgeon under s. 43 of the Workmen's Compensation Act, 1925, as a condition precedent to a claim for compensation on the ground of disablement by an industrial disease is conclusive as to the date of disablement, and it is therefore not competent for the arbitrator to determine that the disablement commenced at an earlier date.

Chuter v. *J. J. Ford & Sons, Ld.* [1915] 2 K. B. 113; *Frost* v. *Clanway Colliery Co.* [1920] 1 K. B. 423; and *Tennent* v. *A. G. Moore & Co.* 1929 S. C. 7 followed.

M'Dougall v. *Summerlee Iron Co.* 1927 S. C. (H. L.) 72 explained.

Decision of the Second Division of the Court of Session in Scotland 1930 S. C. 309 affirmed.

THE following statement is taken from the opinion of Viscount Hailsham.

This is an appeal against a judgment of the Second Division of the Court of Session upon a case stated by the Sheriff-Substitute of Lanarkshire under the Workmen's Compensation Act, 1925, in an arbitraton between the present appellants as respondents and the present respondent as applicant.

The case stated was in the following terms:—

(1.) In the year 1925 the claimant was disabled by miners' nystagmus, and was paid by his employers weekly compensation for total incapacity until July, 1926, when, in exchange for a payment from them of 70*l.*, he discharged his claim.

(2.) In February, 1927, he entered the employment of William Baird & Co., Ld., at St. Flannens Colliery, and resumed work underground.

(3.) In November, 1927, he was again disabled by the said disease, and was paid by his employers weekly compensation in respect of total incapacity until July 26, 1928, when, in exchange for a payment from his employers of 70*l.*, he discharged his claim.

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* *Present:* VISCOUNT HAILSHAM, VISCOUNT DUNEDIN, LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, and LORD THANKERTON.

(4.) From November, 1927, until February 14, 1929, he was unemployed, and from August 11, 1928, until February 14, 1929, he received unemployment benefit.

(5.) On February 14, 1929, he entered the employment of the respondents at East Parkhead Colliery, Belshill, as an underground miner.

(6.) On that date he was still suffering from miners' nystagmus, which he had contracted prior to November, 1927, and had not recovered from his previous disablement.

(7.) After working for about two hours picking and shovelling coal, he complained of a headache, left the pit, and did not thereafter return to work.

(8.) On February 18, 1929, he obtained from the certifying surgeon for the district a certificate that he was suffering from miners' nystagmus, and was thereby disabled from earning full wages at the work at which he had been employed.

(9.) The certifying surgeon certified that the disablement commenced on February 15, 1929.

(10.) An appeal by the respondents against the said certificate was dismissed by the medical referee on March 12, 1929.

(11.) The claimant was totally incapacitated by the said disease until March 20, 1929.

(12.) Since the said last-mentioned date he has been, and still is, partially incapacitated.

The Sheriff-Substitute refused to award compensation on the ground that when the claimant entered the employment of the respondents on February 14, 1929, he was suffering from the nystagmus which he had contracted when working as a miner prior to November, 1927, and that the said nystagmus which caused his present disablement was not "due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement" as required by s. 43, sub-s. 1, of the Workmen's Compensation Act, 1925.

The question of law for the opinion of the Court was whether on the foregoing facts the Sheriff was entitled to refuse to award compensation to the claimant.

The Second Division, by a majority (the Lord Justice-Clerk, Lord Ormidale, and Lord Anderson; Lord Hunter dissenting) answered this question in the negative.

1930. May 19. *Right Hon. A. M. MacRobert K.C.* (with him *James R. Marshall*) (both of the Scottish Bar) for the appellants. Upon a sound construction of s. 43 of the Workmen's Compensation Act, 1925, the certificate of the certifying surgeon is not conclusive as to the date of disablement. The certificate of the certifying surgeon is dealt with in two separate sub-sections. In the first sub-section the certificate is concerned with the existence of the disease and the fact of disablement, and on these two points an appeal is allowed to a medical referee, whose decision is expressly declared to be final. In the second sub-section the certificate is concerned with the date of disablement, and the sub-section provides that the date of disablement is to be such date as the surgeon may certify or, failing his ability to certify a date, is to be the date of his certificate; provided that where the medical referee allows an appeal against a refusal by the certifying surgeon to give a certificate of disablement the date of the disablement is to be such date as the medical referee shall determine. But the statute is silent as to the finality of the decision of either the certifying surgeon or the medical referee on this point, and in a matter of such far reaching importance, affecting not only the respondents, but other employers, finality ought not to be implied. Indeed the sub-section itself, by fixing an arbitrary date for the commencement of the disablement in the event of the surgeon being unable to certify a date shows that it was not the intention of the Legislature that the certificate should be final as regards date. It is so unreasonable that the date of disablement should be unalterably fixed by the uncontrolled decision of a medical expert with no opportunity given to the employer of being heard, that the Court will not readily adopt this construction of the section. The function of the certifying surgeon and of the medical referee is to give their decision as medical men on the technical aspects of the case, but the date at which an industrial disease first begins to affect the wage earning capacity of a workman is not a matter solely dependent on medical considerations and may more properly be determined by an arbitrator. This seems to have been assumed by this House in *M'Dougall* v. *Summerlee Iron Co.* (1), because if the certificate of the certifying surgeon had been conclusive it would have been incompetent for the arbitrator to go into the history of the case as he did, and it would have been wholly unnecessary for the Court of Session or for your Lordships' House to examine the evidence led before the arbitrator. *Tennent* v. *A. G. Moore & Co.* (2) and the two English cases which it followed—*Chuter* v. *J. J. Ford & Sons, Ld.* (3) and *Frost* v. *Clanway Colliery Co.* (4)—are opposed to the appellants' contention and are, it is submitted wrongly decided. Upon the facts the arbitrator was entitled to refuse to award compensation.

Arthur P. Duffes K.C. and *John Cameron* (both of the Scottish Bar) for the respondent were not called on.

1930. May 20. VISCOUNT HAILSHAM [after a narrative of the facts :] My Lords, the decision of the case turns upon the effect to be given to s. 43 of the Workmen's Compensation Act, 1925, and it is important to see exactly what that section provides. Under sub-s. 1 of that section : " Where—(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—(*a*) The disablement or suspension shall be treated as the happening of the accident; (*b*) if it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable; (*c*) the compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due." Then there is a proviso, No. (ii.): "If that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved that other employer shall be the employer from whom the compensation is to be recoverable." Then paragraph (*f*) provides: "If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final, and the medical referee when deciding the matter shall also certify as to the condition of the workman at the time when he is examined by him, and such certificate by the medical referee shall be conclusive." Sub-s. 2 is: "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given." To that there are provisos which are not immediately material.

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(1) 1927 S. C. (H. L.) 72.
(2) 1929 S. C. 7.
(3) [1915] 2 K. B. 113.
(4) [1920] 1 K. B. 423.

My Lords, if sub-s. 2 means that the date stated in the certificate as the date on which disablement commenced is the date of the disablement for the purposes of the section so that no evidence can be adduced to prove that disablement commenced at some other date, then the finding in para. 9 of the case is conclusive in the respondent's favour; if the certificate is not conclusive, then the finding in para. 6 of the case entitles the appellants to succeed.

The present appellants contend that the certificate of the certifying surgeon as to the date on which the disablement commenced is not conclusive, and that it is competent for the arbitrator to review that decision and to determine that disablement commenced at some earlier date than that stated in the certificate. They point out that the certificate is given by the surgeon without hearing the parties and without giving any opportunity to the employers of adducing evidence or of hearing the case put by the workman before the surgeon; and, further, that the date of disablement may be most material in ascertaining the liability, not only of the respondents in the arbitration, but also of other employers who may have employed the workman during the preceding twelve months. They contend that it cannot have been the intention of Parliament to make that certificate conclusive, and that the construction put upon the section by the Court of Session leads to such glaring injustice as to render it necessary to find some other interpretation for the language used.

Your Lordships have not thought it necessary to hear argument on behalf of the respondent, but I am disposed to agree that the interpretation adopted by the Court of Session does involve hardship and possibly injustice to employers who are to be held bound by a decision arrived at in their absence, and without any opportunity afforded to them for putting their view of the facts. But in my opinion the language of the section is perfectly clear and definite, and it is not open to your Lordships to put any other construction upon the words used than that which has been accepted by the Court of Session.

It was argued for the appellants that sub-s. 2 did not in terms state that the certificate of the surgeon was conclusive;

but the sub-section does state that for the purposes of the section—that is, for the purpose of ascertaining the date of the happening of the accident and the identity of the employer who last employed the workman within twelve months previous to the date of the disablement—the date of disablement should be such date as the certifying surgeon certifies as the date on which such disablement commenced. In the face of that express provision I cannot hold that it is competent for the arbitrator to find that the date of disablement should be some other date than that certified by the certifying surgeon, or that he can hear evidence to ascertain for himself a fact whose determination is by statute expressly left to the certifying surgeon. Further, the fact that the sub-section provides that if the certifying surgeon is unable to certify the date on which disablement commenced then that date shall be the date on which the certificate is given, seems to me wholly inconsistent with the view that it shall be a date to be ascertained by the arbitrator upon evidence adduced before him. It may be, as was suggested during the argument, that the Legislature has thought that the provision in sub-s. 1 (*b*) is a sufficient protection for the employer. Whether that be the explanation or not it is not necessary to speculate. The language of the statute is quite plain and unequivocal, and in my judgment it is our manifest duty to give to the words used their plain meaning.

So far as the authorities are concerned, there is nothing in them which supports the appellants' contention. The only express decision on the point to which our attention was called was the case of *Tennent* v. *A. G. Moore & Co.* (1), which was in accordance with the present decision, and indeed which was quite properly treated in the Court below as governing their judgment. And the two cases in the English Court of Appeal, *Chuter's* case (2); and *Frost's* case (3), go in the same direction. It was indeed suggested that *M'Dougall's* case (4) in this House was in favour of the appellants, but I do not

(1) 1929 S. C. 7.
(2) [1915] 2 K. B. 113.
(3) [1920] 1 K. B. 423.
(4) 1927 S. C. (H. L.) 72.

think that that inference is justified from the construction of the judgments in that case. In *M'Dougall's* case (1) a miner had been disabled and had recovered from his disablement, and on September 12, 1925, the certifying surgeon certified that a second disablement had commenced on the previous day. Evidence was adduced before the arbitrator to prove these facts, and the arbitrator held that the facts had been duly proved. In your Lordships' House the arbitrator's decision in favour of the workman was upheld. The appellants contended that your Lordships must be taken to have assumed that the certificate was not conclusive because the judgments proceeded on an examination of the facts and not upon the terms of the certificate. I do not think that this inference is justified. There is no trace in the case of any objection having been raised before the arbitrator to the admission of the evidence, and the utmost that can be said is that possibly this House might have reached their conclusion by a different line of reasoning from that which they actually adopted. I think there is no justification for assuming that any of the learned Lords who took part in the decision in *M'Dougall's* case (1) took any different view of the effect of sub-s. 2 from that which I am inviting your Lordships to take to-day, and I am fortified in that opinion by the fact that two members of the Court who sat in that case are sitting in the present one.

A second point was faintly raised under para. 2 of the proviso to sub-s. 1 (*c*). It was urged that the appellants had proved that the disease was in fact contracted whilst the workman was in other employment and that the proviso was not limited to an employment within twelve months of the date of disablement. The short answer to that contention is that the procedure contemplated in the sub-section has never been adopted; no other employer has been joined as a party to the arbitration, and therefore it is not necessary for your Lordships to consider whether, if such another employer had been joined, the appellants would have been able to escape from liability.

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(1) 1927 S. C. (H. L.) 72.

H. L. (Sc.)
1930
WILSONS AND CLYDE COAL CO. v. FLYNN.

The result is that in my opinion the judgment appealed from is correct, and this appeal should be dismissed with costs. I move your Lordships accordingly.

VISCOUNT DUNEDIN. My Lords, I concur. I confess I was a little perturbed to hear learned counsel state yesterday that in the case before your Lordships' House of *M'Dougall* (1), to which judgment I was a party, this House had given countenance to the idea that the certificate was not final and that a proof was right. Now I think that is based upon a thorough misunderstanding of *M'Dougall's* case (1), and I think I can go into the matter a little further than has been done by my noble friend on the Woolsack. It was perfectly right to have a proof in *M'Dougall's* case (1) according to the views of the First Division. The First Division had held—and it is put most concisely in a single sentence by Lord Blackburn—that the existence of the disease and not the disablement was the accident. Of course, that has been held to be wrong; but, as long as that was right, it was quite right to have a proof. Then, when the case came up here and was reversed, what do I find that I said? Lord Haldane a little unfortunately, I think, went into a discussion as to drawing the distinction between bacilli-infected diseases and non-bacilli-infected diseases; and the consequence was that, although he came to the right conclusion and I said I concurred, I went on to say that I wished to make a few remarks on what he was saying. I mentioned the proof—of course I could not help doing that, because a proof was before us—and then I said this: "But what I wish to say is that I do not understand that the judgment which this House is going to pronounce really turns upon a question of the finding of fact. The real truth is that the learned Sheriff-Substitute did not think that that finding of fact was of moment one way or the other; he took a view upon the law and upon the law alone. Although I most humbly concur with what the noble Viscount has said about the question of the disease of nystagmus, here again

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(1) 1927 S. C. (H. L.) 72.

H. L. (Sc.)
1930
WILSONS AND CLYDE COAL CO. v. FLYNN.
Viscount Dunedin

I think we are giving a judgment upon the meaning of the section, and s. 8 [of the Workmen's Compensation Act, 1906] deals with various other diseases besides the disease of nystagmus." I will not read the whole; but I then go on to say that that section is a code in itself, and I end with these words: "Then when I find that in the case of industrial diseases you have the certificate, I think the result, which has been pointed out by others, follows." I do not think anything can be clearer than that, and to say that we condoned the idea of proof in *M'Dougall's* case (1) is a perfect hallucination.

I would like to say a little more. The present case followed *Tennent's* case. (2) I looked up *Tennent's* case and I find that that case was decided upon a very good argument on the statute by the Lord Justice-Clerk precisely on the same lines as has been followed by the noble Lord on the Woolsack. He then goes on to quote the English cases which have been mentioned, and then Lord Anderson afterwards says: "*M'Dougall's* case has been quoted, and I do not think there is anything in *M'Dougall's* case against what we have been saying." I cannot help remarking that I think if the Lord Justice-Clerk and Lord Anderson had read my opinion in *M'Dougall's* case (1) with the slightest degree of care they would have found in that opinion, not only nothing against what they were saying, but an authority which was equally in point and more binding than the English cases.

As regards myself upon this point, I fancy that I have been sound all along, because, as to the conclusiveness of the certificate and the impossibility of overturning it, I find there were two cases in 1911 in which I said exactly the same thing—*Garrett* v. *Waddell & Son* (3), and the case which immediately follows.

I have thought it necessary to say this because I do not want there to be any misunderstanding as to what *M'Dougall's* case really decided.

LORD BUCKMASTER. I agree.

(1) 1927 S. C. (H. L.) 72.
(2) 1929 S. C. 7.
(3) 1911 S. C. 1168.

H. L. (Sc.)
1930
Wilsons and Clyde Coal Co. v. Flynn.

Lord Warrington of Clyffe. I agree. I only desire to say that in my judgment there is no foundation for the contention that the opinions expressed in *M'Dougall's* case (1) afford support for the appellants' argument in the present case. I agree entirely with the following passage in the opinion of my noble and learned friend Lord Dunedin in *M'Dougall's* case (2): "I think that section 8 is a codification of the whole position itself, so far as industrial diseases are concerned. Then when I find that in the case of industrial diseases you have the certificate, I think the result, which has been pointed out by others, follows." It will be seen that in my own judgment I concurred with the views expressed by my noble and learned friend, and on reflection I am quite certain that none of the noble and learned Lords who took part in *M'Dougall's* case (1) had the least idea of throwing any doubt on the question of the conclusive nature of the certificate on this point, the date of disablement.

Lord Thankerton. I am of the same opinion.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, May 20, 1930.

Agents for the appellants: *Beveridge & Co., for W. T. Craig, Glasgow, and W. B. Rankin & Nimmo, W.S., Edinburgh.*

Agents for the respondent: *Findlay, M'Clure & Co., for R. Maguire Cook & Co., Glasgow, and M'Dougall & Co. S.S.C., Edinburgh.*

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(1) 1927 S. C. (H. L.) 72.

(2) 1927 S. C. (H. L.) 78.

[HOUSE OF LORDS.]

H. L. (E.)*
1930
April 4.

COMMISSIONERS OF INLAND REVENUE . . . . APPELLANTS;

AND

DALGETY AND COMPANY, LIMITED . RESPONDENTS.

Revenue—Income Tax—Relief on Account of Payment of Dominion Income Tax—Income Tax already deducted from Debenture Interest—Finance Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 24), *s.* 43—*Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *ss.* 17, 55—*Finance Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 18), *ss.* 27, 32; *Third Schedule.*

By s. 27, sub-s. 1, of the Finance Act, 1920: "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined" as therein set out.

Similar provisions were contained in s. 43 of the Finance Act, 1916, and s. 55 of the Income Tax Act, 1918, which sections have been repealed.

A company incorporated in England under the Companies Acts, carried on business in the United Kingdom and in New Zealand and Australia, and its income chiefly arose from trading operations in the latter countries. In respect of that income it was liable to income tax in the United Kingdom and in those Dominions. The company having paid the full United Kingdom income tax on all its profits and gains and also Dominion income tax on so much as was earned by it in New Zealand and Australia, claimed relief under the above mentioned Acts from the double tax over a period of eight years ending on April 5, 1924. The company had issued debentures, the principal and interest of which were secured on its whole undertaking and assets, and in paying the interest on the debentures the company, as it was entitled to do, had deducted the full amount of United Kingdom income tax in respect of that interest.

The sole question in dispute was whether the amount of relief was to be calculated on the whole of the profits earned by the company in the Dominions or only on the balance of such profits remaining after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income arising in the United Kingdom:—

Held, (1.) that the word "income" in the relevant sections of the above mentioned Acts meant "taxable income" and not "income less charges," and that the word "paid" in the relevant sections must be construed in its natural sense and not as meaning "paid and ultimately borne," and therefore that the company was entitled to relief under s. 27 of the Finance Act, 1920, and the corresponding sections of the earlier Acts in respect of all income (including that part applied in paying debenture interest) which had already borne Dominion income tax; (2.) that s. 17 of the Income Tax Act, 1918, had no application to the relief given by any of the above mentioned Acts.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, and LORD MACMILLAN.

Decision of the Court of Appeal [1930] 1 K. B. 1 affirmed.

APPEAL by the Commissioners of Inland Revenue from a decision of the Court of Appeal (1) reversing a decision of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The case is set out in full in the report before Rowlatt J. and the Court of Appeal.

The sole question raised by the appeal was whether upon a claim by the respondent company in the circumstances stated in the headnote for relief from United Kingdom income tax on account of the payment of Dominion income tax the amount of income in respect of which relief could be claimed was the full amount of the profits derived from its trading operations in Australia and New Zealand or only the balance of that amount after deducting the debenture interest payable out of it, having regard to the fact that the company, in paying the interest to the debenture holders, had in pursuance of r. 19 (1.) of the All Schedules Rules of the Income Tax Act, 1918, deducted the full rate of United Kingdom income tax.

The Special Commissioners decided this question in favour of the company.

Rowlatt J. reversed the decision of the Special Commissioners. The Court of Appeal (Lord Hanworth M.R., Lawrence and Sankey L.JJ.) reversed his decision and restored the decision of the Special Commissioners.

The arguments on behalf of the Crown are fully reported in the report before the Court of Appeal and need not be repeated.

(1) [1930] 1 K. B. 1.

1930. Feb. 20; March 13. *Sir William Jowitt A.-G.* and *Reginald Hills* for the appellants.

Latter K.C. and *A. M. B. Bremner* for the respondent company were not called on.

The House took time for consideration.

1930. April 4. LORD BUCKMASTER. My Lords, by s. 27 of the Finance Act, 1920, it is enacted that "If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows:—

> (*a*) If the Dominion rate of tax does not exceed one-half of the appropriate rate of United Kingdom tax, the rate at which relief is to be given shall be the Dominion rate of tax:
>
> (*b*) In any other case the rate at which relief is to be given shall be one-half of the appropriate rate of United Kingdom tax."

The meaning of that section is the chief issue on this appeal. It reproduced with some alterations, immaterial for the present purpose, s. 55 of the Income Tax Act, 1918, which in turn was the re-enactment of s. 43 of the Finance Act, 1916. In the Act of 1918 the expression "United Kingdom Income Tax" is defined for purposes of the section as "income tax charged in accordance with the provisions of this Act" and this is only altered in the later statute by substituting the words "the Income Tax Acts" for the last three words of the former definition. These are all the statutory provisions that need immediate attention; the dispute as to their meaning arises in the following way.

The respondents are a company incorporated in England under the Companies Acts and carrying on a business of merchants, insurance agents and bankers, both in the United

Kingdom and in New Zealand and Australia. Its income chiefly arises from operations carried on in the latter countries, and in respect of such income it is liable to income tax in the United Kingdom and in these Dominions.

For the years in question the company paid the full United Kingdom income tax on all their profits and gains and also the Dominion taxes on so much as was earned within their jurisdiction. In these circumstances they claimed relief from the double tax for the years beginning April, 1916, and ending April, 1924. The claim necessarily depended as to the portion up to April, 1920, upon the earlier and after that period upon the later statute, but, as already pointed out, the difference between the two is immaterial for the present purpose.

The claim was disallowed by the Commissioners of Inland Revenue upon the ground that the company had issued debentures and in paying interest thereon had deducted the full amount of the United Kingdom income tax. If, therefore, the claim were allowed in full the company would receive back a sum which would cause the amount of profits distributed by way of dividend to the shareholders to escape the full burden of tax measured in terms of the rate imposed in the United Kingdom.

The actual figures are not material. The question in dispute can be stated in general terms and it is this. If a company registered and carrying on business in the United Kingdom has issued debentures charging its total assets with repayment of capital and interest, can it obtain relief in respect of income tax paid in the Dominions on the amount of all the profits and gains that have paid double tax, or only on the residue after deduction of the debenture interest properly payable out of the profits that are doubly taxed ?

The Special Commissioners held the company entitled to the relief they claimed. Rowlatt J. took a different view, but the opinion of the Special Commissioners was restored by the Court of Appeal.

I have intentionally stated the proposition in the limited terms applicable to the respondent company and have omitted the consideration of the case where the debentures create no security—a case less favourable to the Crown.

It is plain that the right conclusion to be drawn must depend upon the meaning of the words "income" and "paid" in the relevant sections. According to the contention of the Crown the former means income after deducting all payments charged upon it, and the latter means paid without recourse for its recoupment. This may well be a reasonable view of what ought to be done in the circumstances, but it cannot be too often repeated that our duty is not to see what, in our judgment, the Legislature might reasonably do, but that which their Acts declare that they have done, whether by way of imposed burden or of provided relief.

In case of evenly balanced uncertainty the probability of a wise purpose must be considered and may turn the scales, and so also must it be borne in mind where, without some such concession, the words would have no rational meaning, but in all Acts the words used, interpreted as part of the whole statute, constitute the proper guide.

Taking the words in order there can be no doubt the company did pay "United Kingdom Income Tax" on the full amount. "The Income Tax charged in accordance with the provisions of the Income Tax Acts" was charged on the whole of its profits and gains. Nothing less would have been accepted and no other person was liable to make the payment. But it is urged that even if this be accepted, to the extent of the debenture interest, the payment was made on behalf of the debenture holders. To this extent that is true—namely, that, having paid, the company was entitled to deduct the tax from the debenture interest, and, to the extent of that deduction, it was the debenture holders' tax that was thus discharged. But it was not the debenture holders who made the payment but the company. By s. 209 of the Act of 1918, which remains unrepealed, it is expressly provided that in arriving at the amount of profits or gains for the purpose of income tax "no deduction shall be made on account of any annual interest, annuity or other annual payment to be paid out of such profits or gains in regard that a proportionate part of the tax is allowed to be deducted on making any such payment" and by general rule 19 of the Act of 1918, it is expressly provided that the whole of the profits and gains shall be assessed and charged with tax on the person liable to the interest or annual payment without distinguishing the same. In accordance with this the company and they alone could be assessed, from them alone was the amount of the assessment claimed, by them alone was it paid, and they were prohibited from making any deduction from such assessment in respect of annual sums charged on their profits.

The definition in s. 55 expressly invests the words "United Kingdom Income Tax" with the meaning that it is the tax chargeable in accordance with the provisions of the Act and that tax is chargeable on all the profits and gains and the amount paid is the amount which the company are bound to pay and for which they are alone responsible.

If there had been no debentures the claim for relief could not have been resisted and the existence of the debentures cannot in my opinion limit the company's rights and give greater rights to the Crown. It is only the application of the income that has caused the difficulty and with this the taxing authority has no direct concern.

The case of *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) has no direct bearing on the present one, for in that case the division of profits was as between different classes of shareholders who together constituted the company; thus a similar result ensued, for the dividend on the preference shares was paid after the deduction of the full United Kingdom Income Tax with the result that there, as here, the ordinary shareholders received the full benefit of a relief based on a sum not measured by their share of the profits but on the total amount. The fact, however, that the distribution was amongst members of the company and that the company as a whole was in no way advantaged really robs the case

(1) [1921] 1 A. C. 172.

of all value, and I think even prevents its use for the purpose for which it was employed by Lawrence L.J.

A further argument was, however, based on the words of s. 17 of the Act of 1918 which is in these words: "A claimant shall not be entitled to exemption, abatement or relief, in respect of any income the tax on which he is entitled to charge against any other person, or to deduct, retain, or satisfy out of any payment he is liable to make to any other person." The words are apt to cover the present case: the question is do they apply? They are to be found in Part III. of the Act of 1918 which is headed "Exemption, Abatement and Relief."

This part of the Act is confined to specified claims for relief; it begins with s. 9 and proceeds down to and including s. 15 in stating the cases in which relief may be claimed. Sect. 16 shows how the allowance may be made and s. 17 then follows; the remaining sections of this part of the Act deal with the machinery for making and regulating the claims arising under the earlier sections. In this same Act by s. 55 the provisions with regard to the double tax are first introduced—neither by express words nor by reference are the provisions of s. 17 made applicable.

Dealing with this Act alone it is my opinion that s. 17 can only be construed as referring to the special reliefs provided in the separate portion of the Acts in which it stands and were it intended to have had general application it would be found in the general clauses of the Act, as, for example, in those which are grouped in Part X. under the head "Miscellaneous," which, though chiefly dealing with matters of administration, yet, in s. 209 as an illustration, specially makes general provision with regard to the method of arriving at the amount of profits and gains.

So far, therefore, as the Act of 1918 is concerned, in my opinion, s. 17 does not apply to s. 55.

The matter, however, does not rest there. The Finance Act of 1920 provides by s. 64 that Part II. of the Act which includes s. 27, shall be construed together with the Income Tax Acts. This by itself carries the matter no further, for

s. 27 only replaces s. 55 of the Act of 1918 and thus leaves the construction of s. 17 of that Act unaltered, but in its Third Schedule the Act of 1920 provides that the words of s. 17 shall be altered by substituting the words " allowance or deduction " for the words " exemption, abatement," and by Schedule IV. repeals ss. 9 to 13, sub-ss. 1 and 2, of ss. 14 and 15 of the Act of 1918. The sections thus repealed cover the cases mentioned in Part III. of the Act of 1918 as cases entitled to relief, and the argument is that in consequence s. 17, having no longer its proper foundation on which to rest must, as it is expressly preserved and amended, find a new foundation in s. 27 of the Act of 1920.

The simple answer to that proposition is that no new meaning has been conferred upon the words of the section except so far, if at all, as the words " allowance or deduction " confer it, but these clearly relate to the new sections in the Act of 1920 which take the place of those repealed in Part III., and in these new sections the words " allowance and deduction " are found throughout.

The argument of the Crown amounts to this. Be it granted that s. 17 of the Act of 1918 did not apply to the provisions of s. 55 of that statute (Lawrence L.J. says this was expressly admitted by the Attorney-General), yet none the less it does apply to s. 27 of the Act of 1920 although the sections to which it did have application before are replaced by corresponding sections to which it can still refer. In other words, a privilege possessed by the subject in relation to taxation is to be taken away by some repealing and amending words in a Schedule and a general clause as to construing Acts together. I do not believe that any such argument has ever prevailed in construing a Taxing Statute and it certainly cannot prevail in the present case.

VISCOUNT DUNEDIN. My Lords, I concur.

LORD WARRINGTON OF CLYFFE (read by VISCOUNT DUNEDIN). My Lords, the respondents are a company incorporated in England under the Companies Acts with a share capital consisting of Preference and Ordinary shares and with a debenture debt of 2,500,000*l.* of which both principal and interest are secured on the entire undertaking and assets of the company.

Apart from dividends taxed by deduction and income charged to income tax under Schedule A practically the whole of its income arises from trading operations in Australia and New Zealand. Dominion Income Tax has been paid in Australia and New Zealand in respect of such last mentioned income.

The control of the company is exercised in England and the same income has also been assessed to British Income Tax under Case I. of Schedule D.

In paying interest to their debenture holders the company have, as they were bound and entitled to do, deducted from such interest the amount of United Kingdom Income Tax at the full rate. The present case is not concerned with any claims by debenture holders, if any such there be, who have also paid Dominion Income Tax in respect of such interest.

In the year ending April 5, 1917, and in each successive tax year down to and including that ending April 5, 1924, the respondents have made a claim for relief in respect of the Dominion Income Tax so paid as above mentioned under the statutory provisions from time to time in force, all of which were in practically the same form so far as this case is concerned. It will be enough to refer to the last enactment on the subject—namely, the Finance Act, 1920, s. 27, sub-s. 1, which is as follows: " If any person who has paid by deduction or otherwise, or is liable to pay, United Kingdom Income Tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion Income Tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom Income Tax paid or payable by him on that part of his income at a rate thereon to be determined " as in the Act provided.

No question arises as to the rate and the only point at issue is whether the amount of relief is to be calculated on (*a*) the whole of the profits earned by them in the Dominions or only on (*b*) the balance of such profits remaining after deducting therefrom the excess of the interest paid by it on its debentures over the amount of income arising in the United Kingdom. It is agreed that the debenture interest should be regarded as paid out of income arising in the United Kingdom so far as that will go.

The respondents insist on the principle referred to as (*a*), the appellants on (*b*). The Commissioners adopted the view of the respondents. They were required to state a case which came before Rowlatt J. He set aside the assessment of the Commissioners adopting the view of the Crown. The Court of Appeal (Lord Hanworth M.R., and Lawrence and Sankey L.JJ.) unanimously allowed the appeal and restored the assessment of the Commissioners. The Crown appeals to this House.

The respondents' contention is a simple one. The company is a person who has paid or is liable to pay United Kingdom income tax on part of his income—namely, in this case the trading profits earned in the Dominions, and has also paid Dominion income tax on the same part of his income, and is therefore entitled to relief from United Kingdom income tax payable on that part of his income. Reading the words of the statute in their ordinary and natural meaning there is no answer to this contention. But the Crown says the words are not so to be read. The respondents have deducted from the interest payable to the debenture holders the United Kingdom tax in respect of that interest and it is said they have thus recovered a corresponding portion of the United Kingdom income tax paid or payable by them in respect of the profits from their Dominion trade and ought not therefore to be treated as having paid United Kingdom tax on the whole of such profits. Now this view obviously requires that the words of the section be read in a sense other than their ordinary and natural meaning, as, for example, "paid" must be read "paid and ultimately borne." I can find nothing in the other provisions of the Act to indicate that the ordinary construction would bring about a result not contemplated by the Legislature, and I therefore see no ground for the application of the principle of construction adopted in the well known case of *Colquhoun* v. *Brooks* (1), in which the absence of machinery to give effect to the Act, if wide words were used in their ordinary and natural meaning, was held to be sufficient to justify a more limited construction.

I agree therefore with the learned judges of the Court of Appeal that the words of the statute ought to be construed in the ordinary and natural sense and that the respondents have made out a claim to relief calculated on the whole of the profits brought into charge in respect of which Dominion income tax has been paid. With all respect to Rowlatt J. I cannot adopt his view that income in this section means only so much as exceeds the amount of the interest paid out of it. The company pays tax on the whole of that part of its income which is also subject to Dominion income tax and none the less that on making a payment of interest payable out of its profits and gains it deducts, as it is entitled to do, the tax payable by the recipient. The company is not accountable to the Revenue for this tax nor does its right to deduct it depend upon its having paid its own tax on its profits and gains: see r. 19 of All Schedules Rules.

As to the minor point under s. 17 I agree with the views expressed by the Commissioners and the Court of Appeal and have nothing to add.

I think the appeal ought to be dismissed with costs.

LORD THANKERTON. My Lords, the respondent company is a company incorporated in England, but the main part of its income arises from trading profits earned in Australia and New Zealand; as the company is controlled from England, these trading profits are all assessed to United Kingdom Income Tax under Case I. of Schedule D. Dominion Income Tax has also been paid on such profits arising in Australia and New Zealand.

The respondent company claims relief from United Kingdom Income Tax in respect of Dominion Income Tax for the eight financial years ending on April 5 in each year from 1917 to 1924 inclusive.

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(1) (1889) 14 App. Cas. 493.

The company has a large debenture issue, and in paying the debenture interest the company has deducted, sa it was entitled to do, the full rate of United Kingdom Income Tax. Parties are agreed as to the rate at which relief should be granted for the respective years, and that payment of the debenture interest should be treated as having been primarily met out of the company's income arising in the United Kingdom, only the balance of such interest being treated as having been paid out of the Overseas income. The only question is whether the company, in claiming relief, is entitled to include that portion of the Overseas profits, which is to be thus regarded as having been applied in payment of debenture interest.

As regards the first three years in question, the matter depends on construction of s. 43 of the Finance Act, 1916, as regards the fourth year on s. 55 of the Income Tax Act, 1918, and as regards the remaining four years on s. 27 of the Finance Act, 1920. As regards the last four years a subsidiary point is raised by the Crown, which is based on s. 17 of the Income Tax Act, 1918, as amended by the Finance Act, 1920.

The earlier statutory provisions are not materially different and the main question may be conveniently considered in relation to the terms of sub-s. 1 of s. 27 of the Finance Act, 1920, the material portion of which is as follows :

"If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the Special Commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income at a rate thereon to be determined as follows :— . . . ."

Sub-s. 8 (*b*) defines "United Kingdom income tax" as meaning income tax chargeable in accordance with the provisions of the Income Tax Acts.

The respondent company paid the Dominion income tax on the whole of the Overseas trading profits, including that part which was applied in payment of debenture interest, and has not recovered any part of that tax by deduction or otherwise from the debenture holders.

Further the respondent company has paid United Kingdom income tax, for which it alone was liable, on the whole of its profits.

The Crown maintains that the deduction by the company of the appropriate amount of United Kingdom tax on payment of the debenture interest disables the company from thereafter claiming that they have "paid" that amount of United Kingdom tax within the meaning of s. 27, sub-s. 1, of the Act of 1920, or that the profits so far as applied in payment of debenture interest are part of their "income" within the meaning of that section.

The Special Commissioners decided in favour of the respondents, Rowlatt J. in favour of the Crown, and the Court of Appeal in favour of the respondents. I agree with the decision of the Court of Appeal. In my opinion the natural meaning of the language used is in favour of the respondents' contention. In accordance with the provisions of the Income Tax Acts, the whole of the company's profits, whether applied in whole or in part in payment of debenture interest, or not so applied at all, forms their income for the purpose of assessment and charge under Schedule D, and, in my opinion, the fact that they are entitled, though not bound, to recover the appropriate proportion by deduction on payment of the interest, cannot be held to alter the position. The company are entitled to make that deduction, whether they have paid their income tax or not, and are under no liability to account to the Crown for it. The contention of the Crown involves construing "paid" to mean "paid and ultimately borne," a construction for which I see neither necessity nor warrant.

On the subsidiary point raised by the Crown under s. 17 of the Income Tax Act, 1918, I agree with the reasons of the Court of Appeal for its rejection.

I concur in the motion proposed.

LORD MACMILLAN. My Lords, the respondent company has in fact in each of the eight years in question paid United

Kingdom income tax on the whole of its profits wherever arising at the full rate chargeable in each of these years. On the part of these profits which arose in Australia and New Zealand the company has also in each year paid the Dominion income tax chargeable. As regards this part of its total profits the company has thus paid both United Kingdom income tax and Dominion income tax. On this statement the case would appear to fit precisely the language of s. 43 of the Finance Act, 1916, s. 55 of the Income Tax Act, 1918, and s. 27 of the Finance Act, 1920, so as to entitle the company to the relief thereby provided. I observe that when s. 43 of the Act of 1916 was under consideration in this House in the case of *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) Viscount Finlay, after quoting the statutory prerequisites of relief, said: "It is the company and the company alone who fulfil this requirement . . . . it has paid the Colonial taxes and the United Kingdom income tax, and it is the only person entitled to claim and to receive from the Commissioners the repayment provided for by s. 43." In that case, however, the right of the company to relief was not in issue and the only question was whether the company, having had the benefit of relief under s. 43 of the Act of 1916, ought, when paying dividends to its preference shareholders, to deduct tax at the full United Kingdom rate or at a rate diminished to the extent of the relief received. The decision was that tax was deductible at the full United Kingdom rate.

In the present case no question would have arisen as to the respondent company's right to relief but for the circumstance that it happens to have issued debentures and debenture stock. In paying interest to the debenture holders the company has properly deducted income tax at the full rate current in the United Kingdom and not at the rate at which its profits would actually bear United Kingdom income tax if the statutory relief were accorded and taken into account. So far as the debenture interest has been or is deemed to have been paid out of profits arising in the United Kingdom which

(1) [1921] 1 A. C. 172, 181.

have borne full United Kingdom income tax and in respect of which there is of course no claim for relief, no question arises. But in so far as the debenture interest has been paid out of profits arising in the Dominions it has been paid out of a fund which if the relief claimed is accorded will have borne less than the full United Kingdom income tax. The company having deducted tax at the full United Kingdom rate when paying its debenture interest will consequently benefit to the extent of the difference which it retains.

The Crown contends that this is not right and that before any relief from United Kingdom income tax is accorded in respect of the profits arising in the Dominions there should be deducted the amount of the debenture interest paid out of these profits. This contention was supported by an argument to the effect that in all cases of relief under the income tax code income is reckoned net after deduction of all charges. The Crown further maintained that the company had not in fact borne the United Kingdom income tax on its Dominion profits applied in paying the debenture interest because it had recouped itself by deducting tax at the full United Kingdom rate when paying that interest and that the company was consequently not entitled to relief in respect of that part of its income, the persons who had really paid the United Kingdom income tax being the recipients of the debenture interest who had paid it by deduction.

To sustain the respondent company's claim may be to produce a result which can be represented as anomalous, but in my opinion the justification of its claim follows inevitably from the combined effect of the statutory scheme of relief and the system of deduction at the source under r. 19 of the General Rules applicable to all Schedules.

There can be no question that the company has paid full United Kingdom income tax on the whole of its income, including the portion derived from the Dominions and applied in paying its debenture interest. No deduction from assessment has been made in respect of its debenture interest and none could properly be made. The amount of the debenture interest is not deductible for the purpose of ascertaining the net assessable income of the company. It is true that the company will not have borne full United Kingdom income tax on the portion of its income derived from the Dominions and applied in paying its debenture interest if the relief claimed is accorded. But the right to deduct income tax at the full United Kingdom rate when paying its debenture interest is plainly conferred on the company by r. 19, for the condition is that the interest shall be "payable wholly out of profits or gains brought into charge to tax," and the whole profits of the company have been brought into charge to tax. Actual payment, not ultimate incidence, is the criterion both of the right of relief and of the right to deduct.

Since the decision in the case of *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) the Legislature has attempted a reconciliation of the right of relief and the right to deduct by enacting in the Finance Act, 1920, s. 27, sub-s. 5, as regards the payment of dividends that "where under r. 20 of the General Rules applicable to Schedules A., B., C., D. and E., a body of persons is entitled to deduct income tax from any dividends, tax shall not in any case be deducted at a rate exceeding the rate of the United Kingdom income tax as reduced by any relief from that tax given under this section in respect of any payment of Dominion income tax." I am not sure that the effect of this enactment could not be shown to be as anomalous as the present claim is said to be, but at any rate no similar provision is made for the case of payment of interest on debentures, and the right to deduct the full United Kingdom income tax remains where debenture interest is paid out of profits or gains brought into charge to tax.

But does the respondent company's present claim, if upheld, really result in an anomaly? It is true that, if it is granted, the company will have paid its debenture interest out of a fund which will have contributed to the United Kingdom revenue less than the full rate of United Kingdom tax, but it will have paid it out of a fund which has borne

(1) [1921] 1 A. C. 172.

in the shape of combined United Kingdom and Dominion income tax at least the equivalent of the full United Kingdom tax. I rather think that this practical result is just the necessary consequence of the scheme of relief, and it does not seem inherently unjust. No part of the respondent company's income will in the end have escaped without paying and bearing tax at least on the scale of the full United Kingdom income tax, although the United Kingdom revenue will only receive a share of that total tax.

On the other hand the contention of the Crown involves a discrimination in the matter of relief between companies which have and companies which have not made a debenture issue. I do not find any justification in the relevant legislation for such a discrimination. Further, the contention that the recipient of the debenture interest and not the company has paid the United Kingdom income tax within the statutory meaning would preclude the operation of any relief, for if the company has not paid United Kingdom income tax it can have no claim to relief while the recipient of the debenture interest who in the ordinary case will have paid no Dominion income tax will equally have no claim to relief. The result would be that no relief would be accorded in respect of moneys which had in fact borne both United Kingdom and Dominion income tax, and the intention of the Legislature would be defeated.

As regards the separate but important point raised on s. 17 of the Income Tax Act, 1918, in relation to the last four years in question, I am satisfied, as was the Court of Appeal, that it is adequately met by the reasoning of the Commissioners.

I am therefore of opinion on the grounds which I have indicated that the appeal should be dismissed.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, April 4, 1930.

Solicitor for the appellants: *Solicitor of Inland Revenue.*

Solicitors for the respondents: *Bircham & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* 1930 June 27.

WHITLEY . . . . APPELLANT;

AND

STUMBLES . . . . RESPONDENT.

Landlord and Tenant—New Tenancy—Business Premises—Demise of Hotel with Fishing Rights—Expiration of Lease—Grant of a new Lease—Fishing Rights whether to be included—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 5, *sub-ss.* 1 *and* 2; *s.* 17, *sub-s.* 1.

Where an incorporeal right, such as a right of fishing, is demised along with corporeal hereditaments by the same lease, and the lessee uses both for the purpose of his trade or business, the incorporeal right is part of the "premises" within s. 5 of the Landlord and Tenant Act, 1927. Therefore, on the expiration of such a lease, the lessee, if he can show that the compensation for goodwill to which under the Act he would be entitled would not compensate him for the loss of goodwill if he removed to and carried on his trade or business in other premises, may require a new lease of the premises which shall include the incorporeal right demised by the original lease.

Decision of the Court of Appeal [1930] 1 K. B. 393 affirmed.

APPEAL from an order of the Court of Appeal (Scrutton, Greer, and Slesser L.JJ.) (1), affirming an order of a Divisional Court (Swift and Acton JJ.), which set aside a judgment of the judge of the Kingsbridge County Court in favour of the appellant.

The following statement is taken from the opinion of Viscount Hailsham:—

The facts are that by an Indenture dated September 28, 1921, and made between the appellant and the predecessors in title of the respondent, the appellant demised to the tenants a hotel known as the Royal Sands Hotel, at Slapton, together with the exclusive right of fishing the Lower Ley within limits defined in the lease, at a rental of 110*l.* a year for the hotel and the summer fishing rights, and an additional rental of 55*l.* a year for the winter fishing rights. On March 25, 1928, when the lease was about to expire, the respondent gave notice to the appellant requiring a new lease to be granted to him, on the ground that compensation in respect of loss of goodwill would not compensate him for the loss he would suffer if he removed to, and carried on his trade or business in, other premises. The matter was sent to a referee in accordance with the county court rules, and the referee, after hearing evidence and hearing the parties, came to the conclusion that "by reason of the carrying on by the plaintiff or his predecessors in title at the premises of the trade or business of a hotel proprietor goodwill beyond that attributable to the character and situation of the premises has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto;" and also that the sum which could be awarded to the respondent under the provisions of the Landlord and Tenant Act, 1927, would not compensate him for the loss of goodwill he would suffer if he removed to, and carried on his trade or business in, other premises. On that report coming before the learned county court judge, the county court judge held that there was no power to order a new lease of the fishing rights which were comprised in the original lease, on the ground that the word "premises" in the definition section of the Act did not include such a grant. From that decision an appeal was taken to the Divisional Court where, without any appearance on behalf of the appellant, the appeal was allowed. From the Divisional Court an appeal was taken to the Court of Appeal, and the Court of Appeal, after hearing argument on both sides, unanimously dismissed the appeal. From that decision this appeal is brought.

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* *Present:* VISCOUNT HAILSHAM, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD THANKERTON, and LORD MACMILLAN.

(1) [1930] 1 K. B. 393.

The arguments in support of the appeal are set out in the report of the case before the Court of Appeal. The respondent's counsel were not called on.

Du Parcq K.C. and *G. D. Roberts* for the appellant.
Topham K.C. and *S. P. J. Merlin* for the respondent.

VISCOUNT HAILSHAM. My Lords, this appeal raises a point of construction under the provisions of the Landlord and Tenant Act, 1927. [His Lordship stated the facts as above.] It seems to me quite plain that the whole matter must turn on the question as to the meaning to be attached to the language used in the Landlord and Tenant Act of 1927, which gave a right to compensation for goodwill and, in certain circumstances, to a renewal of a lease in lieu of such compensation. The argument for the appellant proceeded on the view that there were indications in the Act that the word "premises" therein used could not be treated as being used in its ordinary legal signification, but as being limited to something a great deal narrower, and at any rate as excluding anything in the nature of a profit à prendre.

I turn therefore at once to the Act to see what it provides. The Act begins by giving certain rights to "a tenant of a holding to which this Part of this Act applies." Sect. 17 defines what are the holdings to which this Part of this Act applies in this language: "The holdings to which this Part of this Act applies are any premises held under a lease, other than a mining lease, made whether before or after the commencement of this Act, and used wholly or partly for carrying on thereat any trade or business, and not being agricultural holdings within the meaning of the Agricultural Holdings Act, 1923." It is, of course, conceded that in strict conveyancing language the word "premises" is used as meaning the subject-matter of the habendum in a lease; but it is said that if you look at earlier sections of the Landlord and Tenant Act you find that in this Act the word is used in what is described as a colloquial sense and as meaning merely the physical buildings and land which are included in the lease, and that the word is restricted so as to exclude such rights as are here in question. My Lords, I think it is fair to say that in some of the earlier sections of the Act it is plain that the Legislature is considering primarily physical premises such as buildings. We find, for instance, in s. 4, sub-s. 1 (*a*), a reference to the possibility of "the premises" being demolished; and we find in s. 5, sub-s. 3 (*b*) (ii.), that the landlord can prove that he intends to pull down or remodel "the premises," and it was argued on behalf of the appellant that this phrase and other similar instances showed that the Legislature, when it used the word "premises," meant only buildings. That contention proves too much. It is conceded—indeed it must be conceded—that the word "premises" does not mean only buildings; it means also at least the land on which the buildings are erected and the land immediately surrounding the buildings, and yet the expression "pull down or remodel the premises" would be wholly inept for such a purpose. It was conceded in argument also that it must include some incorporeal hereditaments such as, for instance, easements. When one gets that concession, which I think was quite properly and necessarily made, then it is manifest that although the word "premises" is being used in a narrow sense to this extent that the Legislature is at times contemplating rather the buildings in which the trade is carried on than the whole of the subject-matter of the lease, yet it does not intend to exclude other things which are properly described as premises in the strict legal sense when it is appropriate that they should be included. When we look at s. 17, the definition section, and we find the reference to "any premises held under a lease," I see no sufficient reason for supposing that the Legislature did not there include not merely the actual buildings in which a trade is carried on, but also the land surrounding them, the easements granted as appurtenant to them, and any other incorporeal hereditaments which may form part of the premises in the strict legal sense of the term which are the subject-matter of the habendum. Any other construction would, it seems to me, defeat the plain purpose of the Act, which obviously was to provide that in the circumstances defined in the Act the tenant should have a right to continue to carry on his trade or business in the premises in the legal sense in which he was carrying them on under the lease for which he seeks that renewal.

My Lords, I desire to add that, while that is sufficient to decide this case, I do not wish to be understood as accepting the view that if the profit à prendre here included had not

Viscount Hailsham.

formed part of the premises within s. 17, the referee or the county court judge would have had power to compel the appellant to grant a lease of those rights as a condition of the grant of a new lease, which I understand to be the second ground upon which the judgment of the Court of Appeal is based. It is sufficient for me to say that, in my judgment, the first ground on which Scrutton L.J. relies disposes of the case, and that I agree entirely with the conclusion which he has reached on that point.

For these reasons, in my opinion the appeal fails, and I move your Lordships that it be dismissed, with costs.

LORD WARRINGTON OF CLYFFE. My Lords, I am of the same opinion and for the same reasons.

LORD ATKIN. My Lords, I agree.

LORD THANKERTON. My Lords, I concur.

LORD MACMILLAN. My Lords, I also agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 27, 1930.

Solicitors for the appellant: *Philip Conway, Thomas & Co., for Harold Michelmore & Co., Newton Abbot.*

Solicitors for the respondent: *Neve, Beck & Crane.*

[HOUSE OF LORDS.]

H. L. (E.)*
1930
May 20.

THE BOURNEMOUTH-SWANAGE MOTOR ROAD AND FERRY COMPANY . . . . APPELLANTS;

AND

HARVEY AND SONS . . . . . . RESPONDENTS.

Ferry — Exclusive or otherwise—Local Act—Construction—Bournemouth—Swanage Motor Road and Ferry Act, 1923 (13 *&* 14 *Geo.* 5, *c. lxxxviii.*), *ss.* 56, 62, 97.

By the Bournemouth-Swanage Motor Road and Ferry Act, 1923, the appellants were empowered to make and maintain a motor road from South Haven Point on the south side of Poole Harbour to a public road leading from Studland to Swanage. By s. 56 of the Act they were empowered to establish, maintain, work and use a ferry service for passengers, animals, vehicles and goods between the Sandbanks and South Haven Point within the harbour. By ss. 62 and 97, inserted respectively for the protection of the Poole Harbour Commissioners and certain landowners, they were required, unless otherwise agreed between the respective parties, to establish or acquire and thereafter continuously to work the ferry, and to provide from seven o'clock in the forenoon when summer time should be in force and from eight o'clock in the forenoon at all other times of the year until one hour after sunset on every day a minimum hourly service of vessels from each shore. They established a ferry service in accordance with these provisions:—

Held, that the Act did not confer on the appellants an exclusive right of ferry, and that they were not entitled to an injunction restraining the respondents, who for many years before the Act had in fact carried passengers between the Sandbanks and South Haven Point without claiming any franchise entitling them to do so, from carrying passengers, bicycles and goods across the mouth of Poole Harbour within or near the limits of the appellants' ferry.

Decision of the Court of Appeal [1929] 1 Ch. 686 affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Romer J. (1) The action was brought by the appellant company for a declaration that they were entitled to the exclusive right of ferry across Poole Harbour between the Sandbanks and South Haven Point, and an injunction to restrain the respondents from carrying passengers, bicycles or goods across the mouth of the harbour within or near the limits of the said ferry.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, and LORD MACMILLAN.

(1) [1929] 1 Ch. 686.

The sole question at issue was whether the Bournemouth-Swanage Motor Road and Ferry Act, 1923, conferred on the appellants an exclusive statutory right of ferry across Poole Harbour between these two points.

Romer J. answered this question in the negative and gave judgment for the respondents, and the Court of Appeal, by a majority (Scrutton and Sankey L.JJ.; Greer L.J. dissenting), affirmed his decision.

The facts are fully stated in the report of the case before the Court of Appeal, and the material sections of the Act of 1923 and of the Poole Harbour Act, 1914, are set out in a note to that report.

1930. March 14. *Montgomery K.C.* and *Elliot Gorst* for the appellants. The Act, in empowering the appellants to establish and maintain a ferry service, intended to bestow upon them an exclusive right of ferry in consideration of the obligations imposed upon them. This construction is strongly supported by the judgment of Parke B. in *North and South Shields Ferry Co.* v. *Barker* (1)—a decision upon a similar Act. The fact that the Poole Harbour Commissioners, who were empowered by the Poole Harbour Act, 1914, to establish a ferry between Sandbanks and South Haven Point and for that purpose to acquire any existing ferry rights within the harbour, and the trustees of the Bankes Settled Estates, who claimed ferry rights across the entrance to the harbour, are expressly debarred by the Act from competing with the appellants so long as the appellants continue to operate their ferry according to the provisions of the Act, also supports the appellants' claim to an exclusive right of ferry.

[They also referred to *Attorney-General* v. *North Eastern Ry. Co.* (2); *Davis & Sons, Ld.* v. *Taff Vale Ry. Co.* (3); *General Estates Co.* v. *Beaver* (4); *Hammerton* v. *Earl of Dysart.* (5)]

(1) (1848) 2 Ex. 136, 147–8.
(2) [1915] 1 Ch. 905.
(3) [1895] A. C. 542.
(4) [1914] 3 K. B. 918.
(5) [1916] 1 A. C. 57, 68.

Earl of Halsbury K.C. and *W. R. Bisschop* for the respondents were not called upon.

The House took time for consideration.

1930. May 20. LORD BUCKMASTER. My Lords, I have read the opinion which my Lord Macmillan has prepared upon this case, and with it I agree and desire to make no additions.

LORD MACMILLAN (read by LORD BUCKMASTER). My Lords, by the Bournemouth-Swanage Motor Road and Ferry Act, 1923, the appellant company was incorporated and was authorized to construct a motor road and establish a ferry in order to provide a more direct means of communication between Bournemouth and Swanage. Between these two places there is interposed an extensive and nearly land-locked arm of the sea known as Poole Harbour necessitating a wide circuit for road traffic. The scheme of the Act was to shorten this route by constructing a motor road about three miles in length from the highway between Swanage and Studland to South Haven Point on the southern side of the entrance to Poole Harbour and establishing a passenger and vehicular ferry across the narrow strait to Sandbanks on the northern side of the entrance whence a public road leads to Bournemouth. The company looked for its remuneration to the tolls which it was authorized by ss. 78 and 79 of its Act to charge for the use of the motor road and the ferry, as set out in Schedules to the Act. In the summer of 1926 the company duly completed the motor road and opened it to traffic and also provided the authorized ferry service by means of a steam vessel working on chains laid across the strait.

The sole question raised in the present proceedings is whether the Act of 1923 confers upon the company an exclusive or monopoly right of ferrying across the entrance of Poole Harbour between South Haven Point and Sandbanks. The action is directed against the owners of some motor boats who have for a number of years been in the practice of conveying passengers for hire across the harbour entrance. The company claims a declaration of its alleged exclusive right and an injunction restraining the defendants from disturbing it in its enjoyment of the ferry. The matter came in the first instance before Russell J. who granted an interlocutory injunction which was subsequently discharged by the Court of Appeal on the ground of the balance of convenience, the respondents undertaking to keep an account of their receipts. The action thereafter came on for trial before Romer J. who dismissed the action, holding that the company had failed to establish that the Act of 1923 had conferred upon it an exclusive right of ferry. On the case being appealed, the judgment of Romer J. was affirmed by a majority, Scrutton and Sankey L.JJ. agreeing with the trial judge while Greer L.J., who dissented, was of opinion that a statutory right to an exclusive ferry had been conferred upon the company. The company now appeals to your Lordships' House.

My Lords, the question of the precise legal character of a franchise of ferry is discussed with much learning in the case of *Hammerton* v. *Earl of Dysart.* (1) Although it may be inaccurate to describe the right of the grantee as a monopoly in the strict legal sense, it was fully recognized in that case that a franchise of ferry entitles the owner to protection from the competition of rivals who seek to disturb him in the enjoyment of his privilege by diverting traffic which he would otherwise convey. If therefore the Act of 1923 has conferred on the company a franchise of ferry or an equivalent thereof the right of the company to restrain competition follows. Has it done so ?

In the first place it is to be observed that the Act nowhere in terms confers an exclusive right upon the company. It can therefore only be by inference from the nature of the right conferred that the company can deduce its alleged monopoly. The inference is not one to be readily drawn, for " a right of ferry is in derogation of common right, for by common right any person entitled to cross a river in a boat is entitled to carry passengers too ": per Lord Macnaghten in *Simpson* v.

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(1) [1916] 1 A. C. 57.

Attorney-General. (1) "The King's subjects are prima facie entitled to go on the Thames, as on any other public highway, from any points on the banks to which they have access, and cross and recross it freely, and to ferry others across": per Viscount Haldane in *Hammerton* v. *Earl of Dysart.* (2) These observations apply equally, indeed a fortiori, to a ferry across an arm of the sea. The inference that it was intended to grant an exclusive right is still less readily to be drawn where the effect of doing so would be to deprive of their livelihood without compensation persons who in the exercise of the common right have been providing members of the public with the convenience of a ferry: cf. *London and North Western Ry. Co.* v. *Evans* (3), per Bowen L.J.; and *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co.* (4), per Lord Atkinson. If, however, the Legislature can be shown to have used language which plainly confers on this company a franchise of ferry in the full legal sense then doubtless the exclusive character of the right conferred may be a necessary inference.

Before proceeding to examine the provisions of the statute in order to see what is the nature of the privilege which it confers it is important to consider the principle of a ferry owner's monopoly. The reason of the protection from competition which he enjoys is to be found in the obligations which he assumes towards the public. "The ferryman has undertaken a public burden in consideration of the Crown's grant of the right to take tolls, and he would have a legitimate grievance if the public, while enjoying the benefit of the obligation, were allowed to destroy the consideration for which it was undertaken": per Lord Parker of Waddington in *Hammerton* v. *Earl of Dysart.* (5) Accordingly one who claims the privilege of a ferry monopoly must be able to show that he has assumed the correlative obligations to the public which are the consideration for his privilege.

What rights then did the Act of 1923 confer and what obligations did it impose on this company in the matter at issue?

(1) [1904] A. C. 476, 490.
(2) [1916] 1 A. C. 57, 73.
(3) [1893] 1 Ch. 16, 28.
(4) [1919] A. C. 744, 752.
(5) [1916] 1 A. C. 57, 85.

The cardinal enactment is to be found in s. 56 which I quote in full: "Subject to the provisions of this Act the company may establish maintain work and use a ferry service for passengers animals vehicles and goods between the Sandbanks and South Haven Point within the harbour and may for that purpose purchase construct hire and provide employ maintain use work and sell or lease such vessels as they may deem necessary together with all proper appliances and conveniences including the laying down and maintaining of chains cables and other apparatus along across over or under the harbour."

Now this section does not purport to grant a franchise of ferry. It merely empowers the company to establish a ferry service. It imposes no obligation on the company whatever; it does not require the company to provide any service. The terms of the section are permissive not obligatory, enabling not mandatory. If the company chose not to provide a ferry service no member of the public could compel it to do so. In short the position of the company is comparable to that of a railway company which has obtained power to construct and work a new line but is under no obligation to the public either to construct it or to work it when constructed: cf. *Darlaston Local Board* v. *London and North Western Ry. Co.* (1)

It is true that in ss. 62 and 97 of the Act inserted for the protection respectively of the Poole Harbour Commissioners and the Bankes Settled Estates certain specific obligations in the matter of carrying on the ferry are undertaken by the company but in both cases the obligations are prefaced with the words "unless otherwise agreed." If the parties otherwise agree these obligations may be modified or abrogated and the public will have nothing to say: see *Attorney-General* v. *North Eastern Ry. Co.* (2) Speaking of provisions of this character in a private Act Lord Cairns L.C. said: "These clauses . . . . are in the nature of private arrangements put into the Act at the instance of particular parties, who either act with greater caution than other parties, or act with a desire to make a better bargain for themselves than other parties

(1) [1894] 2 Q. B. 694.

(2) [1915] 1 Ch. 905.

have made. They are not put in by the Legislature as part of a general scheme of legislation which it desires to express, but they are in the nature of particular contracts, and ought not to have any effect upon the construction of a general clause": *East London Ry. Co.* v. *Whitechurch.* (1) The obligation undertaken to the Poole Harbour Commissioners, I observe, such as it is, stipulates only for a minimum hourly service from seven o'clock in the forenoon when summer time is in force and from eight o'clock in the forenoon at all other times of the year until one hour after sunset on every day.

The position of the company under its Act is thus very different from that of the grantee of a franchise of ferry who "is bound to have his ferry always ready": per Lord Macnaghten in *Attorney-General* v. *Simpson.* (2) "A right of ferry," says Kindersley V.-C. in *Letton* v. *Goodden* (3), "is an exclusive right or monopoly, and, as such, it is in itself an evil, being in derogation of common right, for by common right any person may carry passengers across a river. But as a compensation for that derogation of common right, there is this great advantage to the public, that they have at all times at hand, by reason of the ferry, the means of travelling on the King's highway, of which the ferry forms a part; for the owner of the ferry is under the obligation of always providing proper boats, with competent boatmen, and all other things necessary for the maintenance of the ferry in an efficient state and condition for the use of the public."

It is here that in my opinion the appellants fail. In effect they claim a monopoly without having paid the price for it by assuming the correlative obligations. The Irish case of *Londonderry Bridge Commissioners* v. *M'Keever* (4) is very much in point. There the Bridge Commissioners were empowered by a private Act of 1877 to acquire maintain and work steam or other ferries on the river Foyle and the Court of Appeal held that the statute was merely an enabling one and did not confer an exclusive right of ferry. Mr. Elliot Gorst on behalf of the appellants quite properly drew your Lordships' attention to the analogy existing between market rights and ferry rights but his researches in that analogous field did not appear to have been rewarded by the discovery of any authority throwing further light upon the present problem.

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(1) (1874) L. R. 7 H. L. 81, 89.
(2) [1904] A. C. 476, 490.
(3) (1866) L. R. 2 Eq. 123, 131.
(4) (1891) 27 L. R. Ir. 464.

It is necessary to say a word regarding the case of *North and South Shields Ferry Co.* v. *Barker* (1), upon which the appellants greatly relied. In that case a company was incorporated by private Act "for making, establishing, and maintaining a ferry across the river Tyne, between North and South Shields." Sect. 2 of the statute enacted that "it shall and may be lawful for the said company, and they are hereby authorised and empowered, to establish, keep, and maintain a ferry." Sect. 85 enacted that "from and after the said ferry, to be established by virtue of this Act, shall be made fit for carriages, horses, cattle, and foot passengers, no other ferry shall be set up and used, by any person or persons, across the said river Tyne, within the limits" stated, and imposed a penalty not exceeding 5*l.* on any person using a boat of four tons or upwards for ferrying across the river within these limits. In this case no doubt Parke B. said that by s. 2 the company "would have the same right as under a royal grant of the franchise of a ferry, which would entitle them to bring an action against anyone who infringed their right, which is in the nature of a monopoly, by carrying persons from or to the same place, who otherwise, presumably, would have gone by the ferry." But (1.) the language of s. 2 of the company's Act in that case differed from the language of s. 56 of the present company's statute; (2.) the statute contained an express prohibition against the setting up of a rival ferry; and (3.) the question mainly in issue was whether the express provision directed against the use of boats of four tons or upwards did not imply that boats of less burthen might engage in ferrying without contravening the Act. The considerations to which I have ventured to draw your Lordships' attention in the present case were plainly not present to the mind of the very learned judge who decided the Tyne case, and the statute which he was construing differed in essential respects from the Act which your Lordships have been considering.

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(1) 2 Ex. 136, 147.

An argument was founded by the appellants on certain provisions of their Act debarring the Poole Harbour Commissioners, who by an Act of 1914 had been authorized to establish a ferry at the place in question, and the trustees of the Bankes Settled Estates, who claimed to have ancient ferry rights, from competing with the appellants so long as they operated the ferry. But these provisions are contained in the protective sections to which I have already alluded and are subject to alteration by agreement between the parties. I do not think that they affect the principle on which I suggest to your Lordships that this case should be decided. The provision in s. 57 that the company may purchase by agreement any franchise or right (if any) of ferry between the Sandbanks and South Haven Point does not assist the appellants, for they have not made any such purchase. They must rest their claim to an exclusive right on the terms of their Act and on them alone. So judged their claim in my opinion fails.

I accordingly move your Lordships to dismiss the appeal with costs.

VISCOUNT DUNEDIN. My Lords, I concur.

LORD WARRINGTON OF CLYFFE. My Lords, I agree.

LORD THANKERTON. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, May 20, 1930.

Solicitors for the appellants: *Ashurst, Morris, Crisp & Co.*
Solicitors for the respondents: *Donald McMillan & Mott.*

[HOUSE OF LORDS.]

H. L. (E.)* MINTER (PAUPER) . . . . APPELLANT;

1930

March 20.

AND

PRIEST . . . . RESPONDENT.

Defamation—Slander—Solicitor and Client—Professional Privilege.

In an action for defamation it is for the judge and not for the jury to decide whether an occasion is privileged or not, and the question of express malice, which destroys the privilege, if it is qualified privilege, ought to be put to the jury only after the judge has ruled that the occasion is privileged.

Communications passing between a solicitor and a prospective client with a view to the client retaining the solicitor on professional business are privileged from disclosure, even if the solicitor does not accept the retainer.

Conversations between a solicitor and client relating to the business of obtaining a loan for the deposit on the purchase of real estate are privileged from disclosure, as the business is professional business within the ordinary scope of a solicitor's employment.

Where the relation of solicitor and client is established, any conversation passing between them, to be protected from disclosure, must be fairly referable to that relation; it must be for the purpose of giving or receiving professional advice.

S., who was in treaty with the appellant for the purchase of a house of which the latter was the owner subject to two mortgages, and T., who had arranged with S. for a share of the profit on a resale of the house, interviewed the respondent, a solicitor, and proposed that he should find the money for the deposit and should in that event act as their solicitor in the completion of the purchase. The respondent refused, and in giving his reasons for his refusal slandered the appellant, with whom he had had previous dealings, and he then suggested to S. and T. that he should purchase the house on their behalf with the connivance of the first mortgagee for the amount due on his mortgage with a view to a resale at a profit to be divided between the three. T. repeated the slander to the appellant and gave an account of the interview. In an action by the appellant against the respondent for slander the respondent pleaded that the slander was uttered on a privileged occasion and under such circumstances as to make it a privileged communication. At the trial of the action T., who was called as a witness to prove publication, claimed privilege, but the judge disallowed the claim on the ground that he was entitled to know the facts relating to the interview, and T. then confirmed his statement to the appellant. The jury, in answer to questions put by the judge, found that at the time when the slander was uttered the relationship of solicitor and client did not exist between the respondent and S. and T., and that the respondent was actuated by malice, and they assessed the damages at 1500*l.*; and judgment was entered accordingly:—

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and LORD THANKERTON.

Held, (1.) that the evidence of T. was rightly admitted, but that the judge ought to have decided for himself whether the occasion was privileged before putting to the jury the question of malice; (2.) by Lord Buckmaster, Lord Warrington of Clyffe, Lord Atkin, and Lord Thankerton (Viscount Dunedin being of opinion that there ought to be a new trial) that the slander was not protected from disclosure on the ground of privilege.

Whether the privilege arising from the relation of solicitor and client affords an absolute protection to the solicitor despite the subsequent waiver by the client, *quaere.*

More v. *Weaver* [1928] 2 K. B. 520 observed upon.

Decision of the Court of Appeal [1929] 1 K. B. 655 reversed.

APPEAL from an order of the Court of Appeal (1) setting aside a judgment of Horridge J. in favour of the appellant for 1500*l.*

The action was brought by the appellant against the respondent, a solicitor, for damages for slander uttered by the latter to a Mr. Simpson and a Mr. Taylor at an interview held at the respondent's office between the respondent, Mr. Simpson and Mr. Taylor.

The respondent pleaded that the slander was uttered on a privileged occasion and under such circumstances as to make it a privileged communication.

The action was tried before Horridge J. and a special jury.

The jury found a verdict in favour of the ~~respondent~~ appellant for ?! 1500*l.*, and judgment was entered accordingly.

The Court of Appeal (Lord Hanworth M.R., Lawrence and Greer L.JJ.) upheld the claim of privilege and ordered judgment to be entered for the respondent.

The facts are fully stated in the report of the case before the Court of Appeal and are summarized in the headnote.

1930. Feb. 6, 7, 10. *H. Infield* and *C. G. Austin* for the appellant. The principles of law have been misapplied by the Court of Appeal to the facts of this case, which have been found by the jury in favour of the appellant. The Court of Appeal held that Simpson and Taylor had on the material occasion consulted the respondent as a solicitor and upon professional business, that the communication made by the respondent to Simpson and Taylor was in consequence privileged from disclosure, that Taylor, the only witness called on behalf of the appellant to prove publication of the slander, had claimed such privilege in the witness box, and that there was therefore no admissible evidence of publication to go to the jury. The expression "privilege" is used in two distinct senses: (1.) Privilege from disclosure; (2.) Privilege as a defence to an action for defamation. The former concerns only the compellability or admissibility of evidence and is not necessarily based on the relationship of solicitor and client. For instance, it relieves a witness of the necessity of answering questions which might reasonably incriminate him. It relates to documentary as well as to oral evidence and is not limited to evidence given at the trial of an action. When it operates it gives complete protection. The most common instance is the protection from disclosure of communications passing between a solicitor and his client upon the subject-matter of the professional employment of the solicitor by the client. It is based upon public policy, and is intended to enable a client to communicate freely with his solicitor without fear that the communications passing between them will be disclosed. Although it is the duty of the solicitor to claim such privilege for the benefit of his client, if called upon to disclose such communications, yet it is the privilege of the client: *Russell* v. *Jackson* (1); *Baker* v. *Carrick*. (2) The client may therefore waive the privilege by authorizing the solicitor to make disclosure: *Carpmael* v. *Powis* (3), and when once the privilege has been waived the evidence becomes admissible. The defence of privilege in an action for defamation is based upon the privilege of the occasion upon which the defamatory communication is made. In the case of communications passing between a solicitor and his client upon the subject-matter of the solicitor's professional employment by the client the privilege is founded upon the same general principle as the privilege from disclosure in the case of similar communications: *Browne* v. *Dunn* (1), and this privilege again is the privilege of the client. Privilege in the law of defamation is either absolute or qualified. In the present case the claim of the witness Taylor to privilege from disclosure and the claim of the respondent to privilege as a defence to the present action for defamation are both based upon the relationship of solicitor and client existing in fact or in prospect between the respondent on the one side and Simpson and Taylor on the other at the time when the defamatory communications were made. There being here a dispute as to the existence of such relationship Taylor's evidence was rightly admitted in order to ascertain whether such relationship existed at the material time in fact or in prospect: *Reg.* v. *Cox and Railton* (2); *Bullivant* v. *Attorney-General for Victoria* (3); *Wilson* v. *Rastall.* (4) If the relationship did not actually exist and there was no reasonable prospect of its coming into existence the claim to privilege fails under each of the two heads: *Browne* v. *Dunn.* (1) Furthermore, it was necessary to inquire into the circumstances to ascertain whether the communication was germane to the subject-matter of the respondent's alleged professional employment and whether it had nothing else in view: *More* v. *Weaver* (5); *Browne* v. *Dunn.* (1) "It is for the judge, and the judge alone, to determine as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute, in which case the facts necessary to raise the question of law should be found by the jury": *Adam* v. *Ward.* (6) The facts in this case being in dispute, so far as the privilege of the occasion was concerned, the learned judge was right to leave the questions

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(1) [1929] 1 K. B. 655.

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(1) (1851) 9 Ha. 387.

(2) [1894] 1 Q. B. 838.

(3) (1846) 15 L. J. (Ch.) 275, 277; 1 Phil. 687.

(1) (1893) 6 The Reports, 67.
(2) (1884) 14 Q. B. D. 153, 175.
(3) [1901] A. C. 196, 203, 204.
(4) (1792) 4 T. R. 753, 758.
(5) [1928] 2 K. B. 520, 524.
(6) [1917] A. C. 309, 318.

to the jury as to the actual or prospective relationship of solicitor and client. The questions of fact which he had to answer in relation to the admissibility of evidence were identical with those which the jury had to answer, he was not requested to find them himself and, in the appellant's submission, he was entitled to have their answers uninfluenced by his finding of the facts. The two kinds of privilege are exceptions to the general principles as to the admissibility of evidence and as to the liability for defamatory statements published without lawful justification, and should not be extended beyond the requirements of public policy: *Russell* v. *Jackson.* (1) The onus of establishing the relationship of solicitor and client upon which the claim for privilege was based was upon the respondent, and this onus he has failed to discharge. Simpson and Taylor approached the respondent with a view to his finding the deposit money for the proposed purchase of the Hertford Street property from the appellant, and the respondent's employment was conditional upon his doing so. The lending of money to a client is not normally within the professional business of a solicitor, but may become so if it forms part of the transaction in which the solicitor is or is to be professionally employed by the client: *Hagart and Burn-Murdoch* v. *Inland Revenue Commissioners.* (2) In the present case, as the professional employment was subject to a condition which was never fulfilled, the actual relationship of solicitor and client never came into existence. This case therefore falls outside the scope of authorities such as *Jones* v. *Pugh* (3); *Carpmael* v. *Powis* (4); and *Pearse* v. *Pearse* (5), in which the relationship of solicitor and client having been established, the transaction could not be dissected so as to leave part privileged and to deprive such part of privilege as would not, if it had stood alone, been privileged as falling within the ordinary scope of a solicitor's business. It may be said that at the outset there was a prospective employment, but that prospect disappeared as

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(1) 9 Ha. 387, 391.
(2) [1929] A. C. 386.
(3) (1842) 1 Phil. 96.
(4) 1 Phil. 687.
(5) (1846) 1 De G. & Sm. 12.

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soon as the respondent decided not to accept the conditions. The respondent then proposed to Simpson and Taylor that he should purchase the property on their behalf with the connivance of the first mortgagee for the amount due on his mortgage, and that they should all share the profit on a resale of the property. It was in connection with this suggested scheme that the slanders were uttered by the respondent. At the time of their publication therefore there was neither an actual nor a prospective employment of the respondent as solicitor: *Greenough* v. *Gaskell* (1), but his position was that of a joint adventurer. The finding of the jury is conclusive as to this, for the only evidence of malice which was left to the jury was this suggested scheme, which was put to the jury as showing that the respondent was using the occasion for the purpose of crabbing the deal and making a profit out of the property for himself. Where a communication is made by a client to his solicitor for an illegal or improper purpose, such as the commission of a crime or the perpetration of a fraud, both the communication and the occasion are deprived of privilege: *Russell* v. *Jackson* (2); *Reg.* v. *Cox and Railton.* (3) Those decisions apply a fortiori to the case of a contemplated fraud by a solicitor. The respondent's proposal was in fraud of the second mortgagee and of the appellant as beneficial owner of the property. In order that privilege should exist the communications must be made in professional confidence and in the legitimate course of professional employment to a professional adviser in his character of attorney for the purpose of obtaining legal advice and assistance; and they must be germane to the occasion and have such advice and employment and nothing else in view: *Reg.* v. *Cox and Railton* (4); *Russell* v. *Jackson* (5); *Anderson* v. *Bank of British Columbia* (6); *Wheeler* v. *Le Marchant* (7); *Bramwell* v. *Lucas* (8); *Browne* v. *Dunn.* (9) In the circumstances of the present case Taylor's claim to privilege from disclosure and the respondent's claim to privilege in the law of defamation, based on the actual or intended relationship of solicitor and client, both fail. Assuming that Taylor had any claim to privilege from disclosure the evidence shows that he waived such claim. As the appellant succeeded at the trial on other points it was not necessary for him to argue this point, but it was open for him to do so in the Court of Appeal, as in fact he did: *Waller & Son, Ld.* v. *Thomas.* (1) The only privilege in defamation which the respondent was entitled to claim was the qualified privilege based on common interest, and this could not avail him in view of the finding of malice by the jury.

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(1) (1833) 1 My. & K. 98, 104.
(2) 9 Ha. 387. 391.
(3) 14 Q. B. D. 153, 169, 170.
(4) 14 Q. B. D. 153, 168.
(5) 9 Ha. 387.
(6) (1876) 2 Ch. D. 644, 653.
(7) (1881) 17 Ch. D. 675, 683.
(8) (1824) 2 B. & C. 745, 749.
(9) 6 The Reports, 67, 80.

Sir Henry Maddocks K.C. and *A. E. Woodgate* for the respondent. The communications between the respondent and Simpson and Taylor at the interview of January 9, 1928, were made in reference to business of a professional nature and were privileged from disclosure: *Lawrence* v. *Campbell* (2), approved by Lord Watson in *Lyell* v. *Kennedy* (*No.* 2). (3) The judge ought to have upheld Taylor's claim for privilege and to have held that there was no evidence of publication of the alleged slanders. Assuming that Taylor's evidence was rightly admitted, it showed that the alleged slanders were spoken at a time when professional privilege had been established and before it was determined. The judge ought to have made a ruling upon the question of privilege and to have withdrawn the case from the jury: *Watson* v. *M'Ewan.* (4) Communications passing between a solicitor and a prospective client with a view to the client retaining the solicitor on professional business are privileged, even though the solicitor declines to act: *Cromack* v. *Heathcote.* (5) In the circumstances the raising of the money for the deposit was within the ordinary scope of a solicitor's business, and the whole of the communications which passed at that interview were privileged. When the relationship of solicitor

(1) [1921] 1 K. B. 541, 547.
(2) (1859) 4 Drew. 485, 490.
(3) (1883) 9 App. Cas. 81, 90.
(4) [1905] A. C. 480, 487.
(5) (1820) 2 B. & B. 4.

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and client is established communications passing between them, if relevant to the matter on hand, are absolutely privileged: *More* v. *Weaver* (1), following a dictum of Lord Bowen in *Browne* v. *Dunn*. (2) Communications which pass between a solicitor and client to enable either party to commit a fraud are not within the protection, but the fraud must be clearly alleged and a prima facie case must be made out: *Bullivant* v. *Attorney-General for Victoria*. (3) It is said that Taylor had waived his privilege, but (1.) the onus of proof of waiver was on the appellant and he has failed to discharge it; (2.) the privilege claimed was the privilege of both Simpson and Taylor and waiver by Taylor alone would not be sufficient; (3.) if *More* v. *Weaver* (1) is right, even if the privilege were waived by the client, the solicitor would still be protected.

H. Infield in reply. Taylor could waive his privilege without the sanction of Simpson, as he owed Simpson no contractual or other duty of non-disclosure. *More* v. *Weaver* (1), so far as it decides that the privilege is absolute as regards communications passing between solicitor and client, introduces an unnecessary and unwarranted innovation into the law of defamation and should be overruled. The dictum of Lord Bowen in *Browne* v. *Dunn* (2), on which the decision rested, was merely the expression of a doubt—a doubt which was not shared by the other Lords, all of whom referred to the allegation of malice, which they held to be not proved.

The House took time for consideration.

1930. March 20. LORD BUCKMASTER. My Lords, the appellant was the plaintiff in the action out of which this appeal has arisen—an action which was brought by him to recover damages for slander against the respondent. The appellant succeeded at the trial, and the jury awarded him 1500*l*. as damages. This verdict was set aside by the Court of Appeal on the ground that the slander was protected from

(1) [1928] 2 K. B. 520.
(2) 6 The Reports, 67, 80.
(3) [1901] A. C. 196, 203, 204.

H. L. (E.) 1930 MINTER v. PRIEST. Lord Buckmaster.

disclosure because of privilege, and that and that only is the question on this appeal.

The privilege claimed is that which covers communications between a solicitor and his client, a privilege the maintenance of which is essential in the best interests of society; the examination, therefore, of the circumstances in which it is said that discussion between a solicitor and a person consulting him is not privileged need careful scrutiny.

The appellant is a man who deals in real property, the respondent a solicitor, both carrying on their work in London.

In the course of his business the appellant in the year 1923 bought certain premises known as 19 Hertford Street, London, for 8250*l.*; whether he purchased the freehold or the leasehold interest is not explained, nor is it material.

The respondent had acted as solicitor for the appellant in this transaction and apparently the whole purchase price was provided by various mortgages, the original first mortgagee, from whom the purchase was made, leaving 7000*l.* as a first charge on the property.

The deposit on the purchase was provided by the respondent's wife, who ultimately sued the appellant for the amount, and the appellant in turn sued both the respondent and his wife to set aside documents relating to the sale, the exact nature of which is not disclosed, and this litigation was compromised in June, 1925. These incidents are only material for the purpose of showing that the relationship of the parties was not of a friendly nature. In 1925 at the instance of one of the puisne mortgagees a receiver was appointed of the premises and the appellant subsequently took steps to secure their sale. For this purpose he approached a man named Taylor, who is an accountant, and gave him a commission note for 100*l.* agreeing to pay him 100*l.* if he found a purchaser for the property at the price of 9500*l.* The commission note is not in evidence and it seems uncertain whether it was conditional on finding a purchaser or on completion, but probably it was the latter. Taylor introduced a man named Simpson as a person prepared to purchase at this price, and made some arrangement with him to share the profit on a resale, an arrangement which, if Taylor were the agent of the appellant, was in fraud of his principal. Simpson placed the matter in the hands of Messrs. Parker & Thomas as his solicitors. This firm was also acting as solicitors for Taylor in connection with the purchase by him from the appellant of a house known as 57 Fairlop Road, an incident only deserving notice because of the disreputable arrangement said by Taylor to have been made between him and the appellant by which the real purchase price of 1050*l.* was to be inflated in the conveyance by 300*l.* in order to raise more money on mortgage from certain named persons. It is only right to add that this alleged contemplated crime is denied by the appellant and was not known to Messrs. Parker & Thomas.

The difficulty in effecting a contract with Simpson arose at an early stage over the proposed deposit. The draft contract had put the amount on the usual basis at 950*l.* This had been altered on Simpson's behalf to the nominal sum of 5*l.* and Taylor, who was conducting the proceedings, had been instructed by the appellant to agree it at 475*l.* At this stage an interview took place, on January 9, 1928, between Taylor and Simpson and Sir William Thomas, one of the partners of Messrs. Parker & Thomas, at their offices.

According to Taylor's evidence at that interview the finding of the deposit only was discussed, and Sir W. Thomas said: "You may see Mr. Priest (the respondent) with Mr. Simpson; you may tell him that I stand down and he can act." This statement he subsequently modified by saying—the gist of the conversation was "I cannot find the money. Mr. Priest might find the money; if he does, of course I have no objection to his acting for you." Taylor and Simpson then went to the respondent's office, explained the purpose of their visit and in response the respondent uttered the alleged slanders.

I have gone into this matter in some detail, because it is contended that the relationship of solicitor and client never existed between the parties at this interview, since the employment of the respondent was conditional on his lending the deposit.

Such a conclusion is, in my opinion, indefensible. I agree with the Court of Appeal upon this point. From one solicitor the parties were sent to another to see if he could do what the first would not, and the idea that it was possible to split the interview into two parts, treating the first as a proposal to lend money personally and the second, contingent on this, to act as a solicitor is, to my mind, outside the bounds of reasonable inference.

I am not prepared to assent to a rigid definition of what must be the subject of discussion between a solicitor and his client in order to secure the protection of professional privilege. That merely to lend money, apart from the existence or contemplation of professional help, is outside the ordinary scope of a solicitor's business is shown by the case of *Hagart and Burn-Murdoch* v. *Inland Revenue Commissioners.* (1) But it does not follow that, where a personal loan is asked for, discussions concerning it may not be of a privileged nature.

In this case the contemplated relationship was that of solicitor and client, and this was sufficient.

There is much to be said in favour of the view that, so far as Taylor was concerned, this privilege was waived, but it does not follow that this enabled the conversation to be disclosed. Simpson was also present as a possible client and no authority has been quoted to establish that in these circumstances it was possible for Taylor to waive a privilege which was as much Simpson's as his own.

The relationship of solicitor and client being once established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship, but outside that boundary the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client affords no protection.

(1) [1929] A. C. 386.

According to the evidence in this case the respondent began by making statements as to the character of the appellant, which might in the circumstances have been properly privileged, but he concluded by a proposal that he could get the first mortgagee to sell for 7000*l.* and then they would resell and the three divide the profit. The jury found that this was done maliciously, and found also that at the time when the words complained of were uttered the relationship of solicitor and client did not actually exist between the respondent and either Taylor or Simpson; this, in my opinion, means that the respondent never really undertook the duty of solicitor, but that the conversation from first to last was nothing but the disclosure of a malicious scheme to deprive the appellant of any chance of effecting a contract with a view to the respondent making and sharing with the others a profit on another disposition of the property. Such a finding is in close agreement with the direction given by the learned judge who, after explaining what had taken place, adds: "It is said that that makes it quite clear that Priest was not using this occasion honestly for the purpose of considering whether the advance should be made or not by him or his clients, but that he (Priest) was using it to crab the deal, and get the property and make a profit out of it. If this statement is correct, it is clear that if somebody else bought he would pay the deposit, because what he said was that if Simpson and Taylor liked to buy through him (Priest) he would pay the deposit and buy for 7000*l.*, and it is said that that shows that upon that occasion he was not really using the occasion for discussing whether he should advance the money or not, but he was using these words for the indirect purpose of crabbing the deal and getting the property himself, in order to make a profit out of it in another way. If he did that, then the occasion is not privileged, and he is responsible in the same way as if the words had been uttered on any other occasion. Have I made that clear? (The Jury) Yes, my Lord."

The learned judge then said the answer to this could be found under the head of malice, and this the jury accordingly did find.

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Upon these findings, in my opinion, the cloak of privilege is stripped off the whole conversation and, as the learned judge said, the respondent "is responsible in the same way as if the words had been uttered on any other occasion."

This view does not appear to have been present to the minds of the Court of Appeal, whose judgment rests on propositions of law which, subject to a reservation I will shortly mention, I think are accurate.

There remain two matters which deserve comment. The case as presented was one of difficulty for the learned judge, but I think his duty was to have determined whether the privilege was well claimed or no, for he it was on whom was cast the duty of saying what was evidence for the jury to consider.

The Court of Appeal seem to regard this as equivalent to the necessary exclusion of the evidence, the relationship being once proved, but, if that were so, privilege could be claimed for matters wholly outside its scope. Had the witness said that everything that took place was as between a solicitor and his client it would, in ordinary circumstances, have been difficult to displace his statement, but here the witness on his own showing was untrustworthy and the conversation had been put in writing so that it was possible to show that from its character it did not answer the description.

Finally the case of *More* v. *Weaver* (1) was quoted as showing that if once privilege were established, even if it were waived by the client, the occasion would still protect the solicitor even if acting maliciously. That the occasion would still be privileged so that the solicitor could avail himself of the fact in proceedings for libel is clear. I only desire to add without decision that it does not follow that when once the privilege due to the relationship is waived, the privilege of the occasion is absolute.

For these reasons I think the appeal should be allowed.

VISCOUNT DUNEDIN. My Lords, the facts of this case have been set forth by the noble Lord on the Woolsack and I do

(1) [1928] 2 K. B. 520.

not repeat them. The first observation I wish to make is that it is essential to distinguish between the privilege which allows a witness to decline to answer questions and the privilege which attaches in respect of statements made. The first is essentially a personal privilege and it exists in respect of various relationships or positions. I do not attempt to give an exhaustive category. The one in point in this case, is the relationship of solicitor and client. Therefore, in this case, if nothing else had previously happened and Taylor had been put in the box to say what passed between him and Priest once it was shown that Taylor went to see Priest as a solicitor, I think he would have claimed privilege effectually.

Now, the first argument of the respondent here is, that that being the case, the learned judge ought to have taken pro non dicto all that was said by Taylor in the box, and withdrawn the case from the jury and found for the respondent, because there was no evidence of the publication of the slander. But here something had previously happened. Taylor had told, and had allowed to be committed to writing, all that he afterwards said in the box. Now, as I say, this privilege is personal. I do not think that there is a right in Priest to insist on a privilege which Taylor himself had made non-effectual. This disposes of the first part of the case.

But now comes the question of privilege in respect of statements made, and in so far as the slander consisted in statements made by Priest, it is clear, though Taylor could waive any privilege belonging to himself, he could not waive any privilege enjoyed by Priest. The question that therefore first arises is, had Priest in the circumstances any privilege? My Lords, I had occasion in the case of *Adam* v. *Ward* (1) to make observations in this House on the question of privilege. I have carefully reconsidered these observations, and I have re-read many of the numerous cases which are to be found on this branch of the law, and I adhere to what I then said. I do not weary your Lordships by repetition, but the gist of the matter was that really it is the occasion

(1) [1917] A. C. 309, 332.

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which is privileged, though it is natural enough to speak of the privilege as belonging to the defendant who wishes to avail himself of the doctrine. Now, whether an occasion is privileged or not is for the judge to decide, and not for the jury, and the question of express malice, as it has been called, which destroys the privilege, if it is qualified privilege, ought only to be put to the jury after the judge has ruled whether the occasion is privileged or not. This is no new doctrine of mine. The dictum, which has been cited again and again, is that of Lord Esher in *Hebditch* v. *MacIlwaine.* (1) "The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact upon which the question depends, they must be left to the jury, but when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion."

My Lords, it is here that, in my opinion, this trial was erroneously conducted. There were really no facts in dispute, for the only evidence as to what happened was the evidence of Taylor, and Priest did not go into the box. The questions put by the learned judge to the jury were really not questions as to disputed facts, but were questions calculated to get from the jury the inference they drew from the facts, in other words, I think he practically asked the jury to determine whether the occasion was privileged or not. I think he ought himself to have ruled whether the occasion was privileged or not. If he had taken the view which I understand your Lordships take, he would have held the occasion was not privileged, and he would have had no reason to put any question to the jury except as to damages, for that the words spoken were calumnious could not be contested.

I may say here that I think that so far the learned judges of the Court of Appeal were perfectly right. They disregarded the verdict of the jury and came to the conclusion for themselves that the occasion on which the words were spoken was at a meeting between a person seeking advice from a solicitor and that solicitor. Now that conclusion is a wrong

(1) [1894] 2 Q. B. 54, 58.

conclusion in the view of your Lordships, but what I mean is that they were right in disregarding the verdict of the jury and coming to a conclusion for themselves. Having come to the conclusion they did they were bound by *More* v. *Weaver* (1), or at least thought they were.

It seems to me that the way in which the learned judge tried the case was to obliterate the distinction between two perfectly different ways open to the plaintiff of meeting the defence of privilege—(1.) to contend that the occasion was not privileged, and (2.) that, on the assumption it was privileged, he could prove express malice which would destroy the privilege. Further the questions which he did put, taken as indicative of what he would have asked himself before coming to a decision, were inadequate. The questions as to the situation were: "(Q.) At the time the words complained of were uttered, did the relationship of solicitor and client actually exist between the defendant on the one part, or Simpson and Taylor, or one, and which, of them on the other part ?—(A.) No, neither. (Q.) Did the defendant reasonably believe that Simpson and Taylor, or one, and which, of them would wish to retain him as solicitor ?—(A.) No. Neither."

Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor or expect that he should act as his solicitor, nevertheless the interview is held as a privileged occasion. This follows I consider from the judgment of this House in the case of *Browne* v. *Dunn* (2), reported only in a not very well known set of reports, but I have read the judgments in the Journals of the House. The real question was, therefore, not as put, but was: Were the statements made when the defendant was no longer giving advice as a solicitor, but was introducing a proposal of his own as a speculator ? It is said that the jury really answered this by finding malice, and I think in the light of a certain part of the charge that is possible. But I cannot think that "malice" is what

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(1) [1928] 2 K. B. 520.

(2) 6 The Reports, 67.

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changes a privileged occasion into a non-privileged occasion. "Malice," says Lord Esher, in *Nevill* v. *Fine Arts and General Insurance Co.* (1), "is a state of the mind," and that cannot alter an occasion. What it can do is to destroy the privilege, if it is a qualified privilege, which arises from the occasion. Now, it might seem that this is a distinction without a difference; that is not so, and for this reason. If the finding of the judge is that the occasion is not privileged, the plaintiff need not prove malice, for malice will be inferred from the slanderous words used, but if the judge finds the occasion privileged, it must be either absolute privilege or qualified privilege. If it is absolute privilege, then malice cannot be proved to take it away, secus if it is qualified privilege. Now, the most recent authority on privilege as between solicitor and client is that it is absolute: *More* v. *Weaver* (2), and that case bound both Horridge J. and the Court of Appeal. But it must be admitted that the older authorities point rather the other way, and that the privilege of solicitor and client has been generally dealt with in the books as qualified privilege.

In the view that your Lordships are taking of the occasion being no longer privileged, it is not necessary to decide the question of whether *More* v. *Weaver* was right or not, but if the decision of Horridge J. when, after the jury had answered his questions, he ruled "no privilege" meant that although the occasion was privileged the privilege was destroyed by malice, it would be necessary to decide whether *More* v. *Weaver* was right or not. Now, I have several times used the expression "whether the occasion was no longer privileged." I have done so on purpose, because I understand that all your Lordships agree with me in thinking, whatever the view of Horridge J. was—I am uncertain what it was—that at the outset it was a privileged occasion, because Simpson and Taylor had been sent by one solicitor to another, so that they approached Priest as a solicitor.

Now, I have been forced to be more discursive than I would wish, and I should therefore like to lay down clearly how I think the trial ought to have been conducted.

(1) [1895] 2 Q. B. 156, 169.

(2) [1928] 2 K. B. 520.

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When Taylor, on being put in the box, pleaded privilege to the effect that he did not wish to say anything, I think the learned judge ought to have ruled that there was no such privilege in respect that Taylor had already communicated and so published the result of the interview between Simpson and him on the one hand and Priest on the other. After that ruling Taylor should have been examined and cross-examined, and then if that had been done I do not doubt that his counsel would have put Priest in the box. He did not do so because, the learned judge having refused at this stage to dispose of privilege, he was afraid of losing his claim to absolute privilege if he put his client in the box. If, after Priest had given his evidence, there was a conflict of testimony between him and Taylor, then I think the judge might and ought to have put questions to the jury calculated to bring out which version of the facts they believed, but having done that, he should have ruled that the occasion was either privileged or not before he put any question as to malice. If he ruled that the occasion was not privileged, then the only question left was damages. If he ruled that it was, then in the state of the authorities which bound him he ought to have found for the defendant.

Holding these views I think there should be a new trial, because I think the judge's conduct of the case prevented the defendant's counsel from putting his client in the box. If however the evidence as given is to be taken as the whole evidence in the case, then on that evidence I should come to the conclusion that the occasion on which the words were spoken was not privileged.

LORD WARRINGTON OF CLYFFE. My Lords, the question arising on this appeal is whether the respondent (the defendant in an action for slander brought against him by the appellant) is entitled to be absolutely protected against an action founded on the defamatory words in question on the ground that, as he alleges, they formed part of confidential professional communications between him and certain alleged clients. The Court of Appeal have held that he is so entitled.

The learned judge before whom the case was tried held that the words were spoken on a privileged occasion in the ordinary sense, but as the jury found that there was express malice this qualified privilege afforded no defence, and judgment was entered for the appellant for damages and costs. This judgment was set aside by the Court of Appeal and judgment entered for the respondent with costs.

The only question, therefore, is whether the Court of Appeal were right in holding the respondent to be entitled to the absolute privilege claimed by him.

I think this question may be decided on a short issue of fact —namely, did the relation of solicitor and client exist either actually or in intention at the time the words were uttered ?

The facts may be shortly stated.

In November, 1927, the appellant was the owner, subject to two mortgages, of 19 Hertford Street which he had recently purchased with a view to a resale thereof at a profit.

He employed one Taylor to find him a purchaser at 9500*l.* and agreed if he did so to pay him 100*l.* on completion of the purchase.

Taylor introduced one Simpson as the purchaser and terms of an agreement for sale and purchase at 9500*l.* were settled. The amount of the deposit was to be 475*l.* At the material date the draft agreement had been prepared but the agreement itself had not then and never has been signed.

In the negotiations and the settlement of the draft agreement Sir William Thomas acted as solicitor for Simpson.

Simpson had no money wherewith to pay the deposit and applied to Sir William Thomas to lend him the amount. This Sir William refused to do and advised Simpson and Taylor who was with him at the time to apply to the respondent saying that if he, the respondent, found the money he, Sir William, would stand down and the respondent might act as solicitor in carrying out the deal.

Taylor's position demands some explanation. He was the vendor's agent and yet was employing himself in helping the purchaser to find the funds for going on. The fact is Simpson was buying only for resale at a profit in which Taylor was to share—a not very creditable arrangement.

Taylor and Simpson then approached the respondent with the object of obtaining from or through him money for the deposit with the intention if, and only if, he found the money then to employ him as their solicitor in carrying out the transaction. The conclusion I draw from Taylor's evidence is that as soon as he knew what was required of him the respondent refused to find the money, and accordingly from that moment any professional relation even in intention ceased, and words spoken thereafter would not be entitled to the privilege accorded to professional communications.

The words complained of were uttered subsequently to the determination of such relation actual or intentional as previously existed and related to a matter entirely irrelevant to that about which Taylor and Simpson had approached him—namely, the provision of the deposit and the subsequent carrying out of the deal.

The fact is, as appears from Taylor's account of the interview, that the respondent had conceived the idea of inducing the first mortgagee to sell to him or his nominee for 7000*l.* only, the amount due to him, thus ousting both the second mortgagee and the appellant. Accordingly he set to work to abuse the appellant and throw aspersions on his honesty with a view to inducing Simpson and Taylor to throw up the proposed deal and to enter into the scheme of obtaining the property at a lower price. The ultimate goal was (I need hardly say) the division of any profits amongst the three.

I desire it to be understood that I do not differ from the view of the Court of Appeal that the original approach was by a client to a solicitor or intended solicitor. It cannot be denied that it is part of a solicitor's business to carry out contracts for sale and purchase of land and incidentally thereto to advance or procure the advance of money necessary for those purposes. But if the meaning of the remarks of the members of the Court is that it is part of a solicitor's business to lend money independently of any professional

Lord Warrington of Clyffe.

employment, I must say with all respect that I do not agree, and I think that any such view is inconsistent with the decision of this House in *Hagart and Burn-Murdoch* v. *Inland Revenue Commissioners.* (1)

I do not base the conclusion at which I arrive on the findings of the jury as to the non-existence of the relation of solicitor and client; this issue was a collateral issue and therefore one on which the judge ought to have ruled after hearing such evidence on the point as seemed to him to be necessary. I think this House is entitled now to rule as it may think the judge ought to have ruled at the trial, and that is, in my opinion, that when the statements complained of were made there was no relation of solicitor and client actual or in intention between the respondent and Taylor and Simpson or either of them and that the respondent is not entitled to any privilege other than that usually attaching to words spoken on a privileged occasion and without malice.

On this ground I think the appeal should be allowed, the judgment of the Court of Appeal set aside and that of Horridge J. restored.

In the view I take of the facts it is unnecessary to discuss the true nature and extent of the professional privilege claimed. How far, if at all, can a solicitor, in reliance on that privilege, defend himself against an action founded on defamation, against which on the facts of the case the ordinary qualified defence of privileged occasion would not be a protection owing to the existence of express malice? It must not be assumed however that in abstaining from answering this question I accept all the statements on this head to be found in the judgment in this case, and in *More* v. *Weaver.* (2) So far as I am concerned the question whether the absolute privilege of the client extends to protect the solicitor must be treated as open.

I agree to the order proposed by my noble and learned friend on the Woolsack.

LORD ATKIN (read by LORD THANKERTON). My Lords, this slander action was tried before Horridge J. and a special

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(1) [1929] A. C. 386.

(2) [1928] 2 K. B. 520.

Middlesex jury. It raised important questions arising out of confidential relations between solicitor and client. That very experienced judge found the case difficult, as it indubitably was. It is not surprising that even with such competent hands at the wheel in the shallows of a tortuous passage the ship once or twice grounded. I do not propose to recapitulate the facts. The publication alleged was at an interview between the defendant, a solicitor, and two gentlemen, Taylor and Simpson, who had gone to interview him with a view to procuring a loan of a sum of 450*l.* for the purpose of a deposit on a purchase by Simpson from the plaintiff of a house in Hertford Street. Taylor was the plaintiff's agent in the transaction and was to receive a commission of 100*l.* if the deal went through.

My Lords, confidential communications passing between solicitor and client are doubly guarded in the law. It is important to emphasize the twofold nature of the protection given; for they are commonly said to be privileged and the word unfortunately tends to confuse two entirely distinct rights.

In the first place they are protected from disclosure whether by production of documents or in oral evidence. This protection is part of the law of evidence. It has no direct relation to the question whether the communication itself constitutes a cause of action. Neither the solicitor nor the client need be party to the action in which the question of evidence arises. Also it matters not whether the action be for defamation, fraud (subject to limitations to be discussed), breach of trust, breach of contract or otherwise; if the communication comes within the prescribed rule it is inadmissible in evidence. The object is no doubt to enable the persons concerned to communicate freely without fear of exposing themselves or others to actions. But the right to have such communications so protected is the right of the client only. In this sense it is a "privilege," the privilege of the client. If the client chooses to withdraw the veil, the law interposes no further difficulty. The communications are then available as evidence.

Once the communications have been admitted in evidence the second protection comes into force. This affects the question how far the communications can form part of a cause of action. They have become evidential: are they actionable? The protection here is limited. As far as I know it is confined to actions of defamation. I am not aware of any authority which would prevent a client from revealing communications made to him by his solicitor for the purpose of bringing an action of fraud, breach of trust, or negligence against him: just as the communications may if disclosed by the client be used as evidence in any actions by or against a third party. In actions of defamation, however, the communications are "privileged." To what extent this protection goes is in dispute in this case. The defendant's contention, relying upon the recent decision of the Court of Appeal in *More* v. *Weaver* (1), is that the communications are absolutely privileged, so that no action of defamation can be brought upon them. The plaintiff's contention is that the privilege is only a qualified privilege, i.e., that they receive only the ordinary protection of other confidential communications—namely, that the occasion upon which they are made is a privileged occasion, and the plaintiff to succeed must prove express malice. The main question in this case is whether the words complained of were confidential communications between solicitor and client so as to be entitled to the twofold protection I have mentioned. The test for such protection has been defined in different words in a number of cases. I think it is best expressed in two phrases used in the Court of Appeal in the leading case of *O'Shea* v. *Wood.* (2) Lindley L.J. adopts the language of Cotton L.J. in *Gardner* v. *Irvin* (3): "professional communications of a confidential character for the purpose of getting legal advice." Kay L.J. refers to the language of Kindersley V.-C. in *Lawrence* v. *Campbell* (4), and adopted by Lord Selborne L.C. in *Minet* v. *Morgan* (5), communications

(1) [1928] 2 K. B. 520.
(2) [1891] P. 286, 289.
(3) (1878) 4 Ex. D. 49, 53.
(4) (1859) 4 Drew. 485, 490.
(5) (1873) L. R. 8 Ch. 361, 368.

passing as "professional communications in a professional capacity." The Lord Justice prefers the former phrase, and emphasizes the importance of the confidential character. As to this it is necessary to avoid misapprehension lest the protection be too limited. It is I think apparent that if the communication passes for the purpose of getting legal advice it must be deemed confidential. The protection of course attaches to the communications made by the solicitor as well as by the client. If therefore the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined. One exception to this protection is established. If communications which otherwise would be protected pass for the purpose of enabling either party to commit a crime or a fraud the protection will be withheld. It is further desirable to point out, not by way of exception but as a result of the rule, that communications between solicitor and client which do not pass for the purpose of giving or receiving professional advice are not protected. It follows that client and solicitor may meet for the purpose of legal advice and exchange protected communications, and may yet in the course of the same interview make statements to each other not for the purpose of giving or receiving professional advice but for some other purpose. Such statements are not within the rule: see per Lord Wrenbury *O'Rourke* v. *Darbishire*. (1)

Not all communications therefore passing between solicitor and client are protected. How is the question of protection from disclosure to be determined, when there is a dispute? If the judge admits the evidence of what was said or written he destroys the protection: if he does not hear the evidence he cannot determine the dispute.

It is necessary also to remember that this dilemma is presented for solution to the judge alone. The question is one of admissibility of evidence: and on all such questions it is for the judge to decide after hearing, if necessary, evidence

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(1) [1920] A. C. 581, 629.

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on both sides bearing on any contested question of fact relevant to the question. Thus the question whether a confession is voluntary or a deposition admissible as a dying deposition are questions to be determined by the judge and not the jury: cf. *Bartlett* v. *Smith.* (1)

Fortunately the procedure is settled by opinions expressed in this House which appear to me to be authoritative. The question has arisen in two cases where it was suggested that the protection did not apply, because the communications passed for the purpose of enabling the client or the solicitor, as the case might be, to commit a fraud or fraudulent breach of trust.

In *Bullivant* v. *Attorney-General for Victoria* (2) a question had arisen in litigation in Victoria as to whether a testator had made certain conveyances before his death "with intent to evade the payment of duty" under a colonial statute. A commission had been ordered in Victoria to examine witnesses in this country and witnesses were duly summoned under the English statute 22 Vict. c. 20, the Evidence by Commission Act, 1859. One of the witnesses claimed professional protection. The suggestion for the plaintiffs was that the communications were for the purpose of enabling the client to commit a fraud or illegality—namely, to evade payment of duty. This House held that there was no fraud alleged or proved.

Lord Halsbury referring to the dilemma says: "The line which the Courts have hitherto taken, and I hope will preserve, is this—that in order to displace the prima facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not. I do not at present go into the modes by which that can be made out." He expands this by saying at the trial the judge would have to satisfy himself that the issue to be tried was whether there was a fraud or not, and that this was a piece of evidence relevant to establish the fraud.

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(1) (1843) 11 M. & W. 483, 486.

(2) [1901] A. C. 196, 201, 203.

In *O'Rourke* v. *Darbishire* (1) the plaintiff suggested that communications which prima facie were entitled to protection passed for the purpose of carrying out a fraud. Most of the learned Lords who decided the case expressed their opinion upon this point. Lord Finlay says: "The statement" (i.e., of fraud) "must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact."

Lord Sumner says: "The right of the one party to have discovery and inspection and the right of the other, within certain areas, to be protected from inspection, are parallel rights; in itself neither is paramount over the other. It is therefore the business of the party claiming protection to meet a properly framed claim of professional privilege by showing that the privilege does not attach because it is being asserted for documents which were brought into existence in furtherance of a fraud, and he can only do this by establishing a prima facie case of fraud in fact. Evidence, admission, inference from circumstances which are common ground or 'what not,' as Lord Halsbury says, may serve for this purpose." See also per Lord Parmoor and Lord Wrenbury.

The above cases referred to evidence taken on commission and to discovery of documents and related to the exemption from protection based on fraud; but it seems obvious that the same principles apply when the question arises on the trial: and where the protection is attacked not on the ground of fraud, but on the ground that the communications did not pass for the purpose of giving or receiving professional advice at all.

In the present case the contention of the plaintiff was that the words complained of were not in fact professional communications, but were uttered for the independent purpose of securing to the solicitor an interest in a different transaction in the same property. The learned judge ought to have himself decided whether the evidence of publication was admissible. He allowed it to be given, apparently intending the final decision to be made by the jury. In leaving any question of evidence to the jury he was I think wrong:

(1) [1920] A. C. 581, 604, 614, 622, 633.

though the position was made difficult by the decision in *More* v. *Weaver* (1) that the professional communications even if proved are not actionable. It would appear on principle that any contested question of fact relating to the actionable as opposed to the evidential character of the words would rightly be for the jury. The judge is clearly put in a difficulty. Nevertheless, I think it clear that on the question whether the words shall be admitted in evidence, i.e., whether there shall be any material for the jury to come to a decision, the judge himself must rule. In the present case I think that there was ample prima facie evidence from the nature of the words alleged to be used that some other purpose than professional advice was intended by the defendant, and that the evidence was rightly admitted. I am inclined to think that when once the judge has rightly come to the conclusion that the evidence is admissible the contest as to protection from disclosure is over. The seal is broken: the statements cannot be resealed. The only question that would remain is whether the words so disclosed are relevant to establish a cause of action. In the present case, however, as, in my view, it was finally established by the verdict of the jury that the words never were protected, the precise effect of a judge's ruling need not be determined. To determine the question whether the words were entitled to professional protection the judge left certain questions to the jury with directions on the law. I agree with the judgments in the Court of Appeal in thinking that on this matter the learned judge took too restricted a view of the relations which bring into existence the protection. It is not necessary that the relations should have reached the definite status of solicitor and client. The solicitor may not be willing to be employed as a solicitor by the person with whom he may be communicating. If a person goes to a professional legal adviser for the purpose of seeing whether the professional person will give him professional advice, communications made for the purpose of indicating the advice required will be protected. And included in such communications will be those made on occasions such as the present where the parties go to a solicitor for the purpose of seeing whether he will either himself advance or procure some third person to advance a sum of money to carry out the purchase of real property. Such business is professional business, and communications made for its purpose appear to me to be covered by the protection, whether the solicitor eventually accedes to the request or not. If the matter rested here we should have to consider whether the proper remedy was not a new trial. But there is a finding of the jury which is not affected by the direction complained of, and appears to me to dispose of the matter. In the event of the jury finding as they did that the relation of solicitor and client did not exist, the judge rightly in his view of the law ruled that the occasion would be a privileged occasion, and left to the jury the question of express malice. I have carefully perused the passages of the judge's summing up on this point, and it seems to me clear that the only suggested evidence of malice which was left to the jury was evidence from which they might infer that the words were not spoken for the purpose of giving professional advice on the transaction of the purchase of the property from the plaintiff, but for the purpose of destroying the proposed clients' confidence in that transaction in order to induce them to enter into a different transaction by which a different purchaser as a nominee would buy from the first mortgagee at a reduced price: and the three persons, the two alleged clients and the solicitor, would share in the profits of a resale. The finding of the jury that there was express malice must be taken to affirm this view of the facts, for no other case was made before them or left to them. There appears to me to be ample evidence to support the finding. Construed as above, I think that the jury have found on admissible evidence that the words complained of were not spoken "for the purpose of giving or receiving professional advice" but were spoken for a purpose independent of professional advice—namely, to carry out a speculation in real property and to enable the solicitor to secure a participation in its profits. Communications made in such circumstances are not entitled to protection from disclosure. They could not therefore be entitled to the absolute protection from being actionable laid down in *More* v. *Weaver* (1): they are not protected by qualified privilege, being spoken with express malice, and the verdict for the plaintiff must stand. It is true that the damages given are large, but the words spoken were seriously defamatory, and nothing appears to indicate that the jury must have taken into their consideration matters not properly relevant to the assessment of damages for the words spoken in the circumstances of this case. In this view of the case it becomes unnecessary to consider whether evidence of the publication was admissible on the ground that the witness Taylor had waived the protection given by law. While I have little doubt that the witness himself had waived the protection, I am left in doubt whether such waiver would of itself have made the evidence admissible in the absence of proof of waiver by the other proposed client Simpson. As the admissibility does not turn upon waiver I desire to leave this matter open.

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(1) [1928] 2 K. B. 520.

It also becomes unnecessary to consider the important question whether the law really is as decided in *More* v. *Weaver* (1), that communications protected from disclosure are when disclosed absolutely privileged. In that case the female plaintiff appeared in person and the contrary construction was therefore not argued by counsel; the decision considerably extends the protection which up to its date had been confined to communications made by judge, counsel and witnesses in the course of judicial proceedings, and is based upon a view of public policy which appears to be somewhat widely stated and is certainly not the view accepted in Scotland. I prefer to leave the correctness of the decision entirely open for consideration hereafter in this House. In my opinion the appeal should be allowed, and the verdict and judgment for the plaintiff restored with costs in Court of Appeal.

LORD THANKERTON. My Lords, I am in entire agreement with the opinion of my noble and learned friend on the

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(1) [1928] 2 K. B. 520.

Woolsack, and I also desire to reserve my opinion as to the contention, based on the case of *More* v. *Weaver* (1), that, if the privilege be established, the solicitor, despite subsequent waiver by the client, would still be protected by such privilege.

Order of the Court of Appeal reversed, and judgment of Horridge J. restored. The respondent to pay the costs in the Court of Appeal, and also the costs of the appeal to this House to be taxed in the manner usual when the appellant sues in forma pauperis. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 20, 1930.

Solicitors for the appellant: *Clarke & Co.*
Solicitors for the respondent: *Freeman, Haynes & Co.*

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(1) [1928] 2 K. B. 520.

[HOUSE OF LORDS.]

H. L. (Sc.)*
1930
May 27.

BOWIE OR RAMSAY . . . . APPELLANT;

AND

LIVERPOOL ROYAL INFIRMARY AND OTHERS . . . . RESPONDENTS.

International Law—Domicil—Domicil of Origin—Domicil of Choice—Prolonged Residence within new Domicil—Absence of independent Evidence of intention to change Domicil.

It being settled that a change of domicil must be made animo et facto, the animus may be inferred by the factum of residence within the new domicil, but in order to warrant that inference the quality of the residence must be taken into account; mere length of residence is not of itself sufficient.

A testator who died in Liverpool in 1927, aged eighty-two and unmarried, left a holograph will, valid by the law of Scotland but invalid by the law of England. The testator's domicil of origin was Scottish, and he lived the greater part of his life in Glasgow. Originally employed there as a commercial traveller he gave up that employment in 1882 and never worked again. In 1892 he went to Liverpool to be near a brother and sister, and lived there for the last thirty-five years of his life. He was supplied with the means of subsistence by his brother and sister, and on the death of his sister he succeeded to the whole of her estate. With the exception of family ties he had few, if any, ties in either England or Scotland.

In an action by beneficiaries under the will against the testator's next of kin for a declaration that the testator was domiciled in Scotland at the date of his death:—

Held that, in the absence of independent evidence of an intention on the part of the testator to change his domicil, the burden which lay on the next of kin of proving that he had abandoned his domicil of origin had not been discharged.

APPEAL against an interlocutor of the First Division of the Court of Session in Scotland affirming an interlocutor of the Lord Ordinary (Lord Mackay).

George Bowie, whose domicil of origin was Scottish, but who had lived the latter part of his life in Liverpool, died in Liverpool on November 5, 1927, leaving a holograph will dated August 7, 1927, which was valid by the law of Scotland but was not valid by the law of England.

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD THANKERTON, and LORD MACMILLAN.

This action was brought by the respondents, the residuary legatees under the will, against the appellant, the testator's sole next of kin, for a declaration that the testator's domicil at the date of his death was Scottish.

The Lord Ordinary held that the defender had failed to prove that the testator had changed his domicil and granted the declaration, and the First Division (the Lord President, Lord Blackburn (doubting but not formally dissenting), and Lord Morison) affirmed his decision.

The facts are fully stated in the opinion of Lord Buckmaster and are summarized in the headnote.

1930. March 24, 25. *J. S. C. Reid* (of the Scottish Bar) (with him *G. R. Thomson* (of the Scottish Bar) and *Chrussachi* (of the English Bar)) for the appellant. The most important question in determining where a person is domiciled is to inquire where he has made his home. If a person has voluntarily settled and made his permanent home for a prolonged period in a country other than his native country, that is sufficient, in the absence of strong countervailing evidence, to establish a change of domicil. It is not necessary to prove that he has consciously entertained any specific intention to abandon his domicil of origin or to acquire a new domicil. Such an intention may legitimately be inferred from his conduct: *Udny* v. *Udny* (1); *Bell* v. *Kennedy*. (2) Indeed, even if a person has deliberately expressed an intention to retain his domicil of origin that will not suffice if the facts show that he has settled permanently in another country: *In re Annesley* (3); *In re Steer* (4); *Aikman* v. *Aikman* (5); Dicey's Conflict of Laws, 4th ed., p. 106. Intention to reside permanently is the sole element to be considered. *Winans* v. *Attorney-General* (6) is distinguishable. That was the case of a man who was disinclined to move but who hoped to move home. Here the testator

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(1) (1869) 7 M. (H. L.) 89, 95, 96, 98, 99, 100; L. R. 1 H. L. (Sc.) 441, 449, 455, 458, 459.

(2) (1868) 6 M. (H. L.) 69; L. R. 1 H. L. (Sc.) 307.

(3) [1926] Ch. 692, 700, 701.

(4) (1858) 3 H. & N. 594.

(5) (1861) 3 Macq. 854, 858.

(6) [1904] A. C. 287, 288, 291, 298, 300.

H. L. (Sc.)
1930
RAMSAY v. LIVERPOOL ROYAL INFIRMARY.

regarded Liverpool as his home. In *Casdagli* v. *Casdagli* (1) the question was whether there was any impediment to acquiring a domicil in Egypt by reason of the constitution of that country, but your Lordships took the view that where a man makes his permanent home in a new country with no intention of returning to his domicil of origin, that is sufficient to effect a change of domicil. [He also referred to *Lord Advocate* v. *Jaffrey*. (2)] These are all single residence cases. Double residence cases depend upon different considerations. In such cases independent proof of an intention to change the domicil of origin is essential. But this is a case of the exchange of one permanent home for another and not the simultaneous possession of two homes. *Marchioness of Huntly* v. *Gaskell* (3) is easily distinguishable. There, the testator, an Englishman, had two houses in England, although his principal residence was in Scotland, and he was the chief partner in a bank at Manchester. So also in *Ross* v. *Ross* (4) the appellant, a Scotsman, with an ancestral home in Scotland, resided mainly in New York for income tax purposes, but he regarded his Scottish residence as his home. [Counsel also referred to *Maxwell* v. *McClure* (5); *Fairbairn* v. *Neville* (6); *Corbidge* v. *Somerville* (7); *Steel* v. *Steel*. (8)]

A. C. Black K.C., *J. F. Strachan* (both of the Scottish Bar) and *O. L. Bateson* (of the English Bar) were not called upon.

The House took time for consideration.

1930. May 27. LORD BUCKMASTER. My Lords, the facts in this appeal are fortunately free from controversy; the difficulty, and a serious one, is to interpret the true meaning of these facts in relation to the question of domicil.

The law upon the matter is settled. A domicil of origin can be changed and in its place a domicil of choice acquired, but the alteration is a serious matter not to be lightly assumed, for it results in a complete change of law in relation to two of the most important facts of life, marriage and devolution of property. This is admirably expressed by Lord Curriehill in *Donaldson* v. *M'Clure* (1), in words unnecessary to repeat, which were expressly approved by Lord Halsbury in *Marchioness of Huntly* v. *Gaskell.* (2)

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(1) [1919] A. C. 145, 169, 172, 178.
(2) [1921] 1 A. C. 146.
(3) [1906] A. C. 56; 8 F. (H. L.) 4.
(4) [1930] A. C. 1.
(5) (1860) 3 Macq. 852.
(6) (1897) 25 R. 192.
(7) 1914, 1 S. L. T. 304.
(8) (1888) 15 R. 896, 910.

To acquire a new domicil it is essential, in the words of Lord Wensleydale in *Aikman* v. *Aikman* (3), to show that the person who is said to have changed his domicil "has abandoned his former domicil animo et facto."

To avoid misunderstanding it is, I think, well to point out that in some cases the animus can be established by the fact, and the proof of a change of domicil does not necessarily fail because it is only from the facts that the intention can be ascertained. I agree also with the view admirably expressed by counsel for the appellant that search for independent proof of intention becomes most essential where a residence is retained in the domicil of origin. In this case no such circumstance exists.

George Bowie, whose domicil is in dispute, was born in Glasgow in 1845. He was one of a family of nine, of whom three died in childhood. He was the youngest but one of the family, the others who attained majority being in order of seniority Isabella, John, Dolina, Annie and Alexander. All the members of the family died unmarried except John. The appellant is the only child of the said John Bowie. George Bowie was employed for some time as a commercial traveller in Glasgow, but there is no evidence to show that his duties took him away from Scotland. He ceased to work in 1882, and he never appears to have worked again. He had always resided in his father's house and he continued to reside there.

His father died in 1884, but this did not produce any change in his habits, and he remained in Glasgow, first with his mother and sisters Dolina and Annie, and then with these two sisters alone.

(1) (1857) 20 D. 307, 321.

(2) [1906] A. C. 56, 66.

(3) 3 Macq. 854, 877.

About 1883 his brother Alexander and his sister Isabella went to reside in Liverpool, where Alexander had obtained some employment in a shipping office. There they were joined by the mother, and later between 1890 and 1892 by George Bowie. It was not in search of work that George Bowie came to Liverpool; he appears to have gone partly because he was more closely attached to his mother and sister Isabella than to other members of the family, and partly perhaps because his only means of support was an allowance from his brother Alexander. In Liverpool he went into lodgings, and remained in the same lodgings for over twenty years, during which time he only left Liverpool once, when he went to the United States apparently in search of work, but he was not a successful searcher after work, and he soon returned unoccupied.

The mother died in 1905 and was buried in Glasgow, but he did not attend the funeral.

After the mother's death Dolina and Annie gave up their house in Glasgow and also came to Liverpool, where all the family lived together at 4 Winfield Place except George, who continued to abide in his lodgings.

In 1912 first Dolina and then Alexander died, Isabella and Annie continuing in Winfield Place and George in his lodgings. In 1914 Annie died, and Isabella went with the appellant to Glasgow, where she would have wished to remain, but, as George stayed on at Liverpool, she rejoined him there at 4 Winfield Place, into which house he had moved, where he remained until her death in 1920, and alone after her death until he too died on November 5, 1927.

He left a holograph will unattested, valid under Scotch but void under English law.

By this will he left a number of legacies, and gave the residue as to one-fourth to the Royal Infirmary at Liverpool and the remaining three-fourths to three infirmaries in Glasgow, concluding with this sentence: "These infirmary legacies (to be anamous (*sic*), say a Glasgow man)." The residuary legatees on May 4, 1928, issued a summons in Edinburgh against Mrs. Isabella Ramsay, his sole next of kin, asking for a declaration that George Bowie was domiciled in Scotland at the date of his death and that his will was valid according to the law of Scotland. The Lord Ordinary declared in favour of the pursuers, and on appeal their Lordships of the First Division adhered to the interlocutor which the Lord Ordinary had pronounced. From such decision Mrs. Isabella Ramsay has brought this appeal.

The main facts as I have stated them are but little embellished by other evidence. It is proved that George Bowie refused to go to Scotland when his sister Isabella desired to remain there in 1915. He is also reported to have said he never wished to set foot in Glasgow again, and he arranged for his burial in Liverpool beside his brother and sisters. On the other hand he referred to himself as a Glasgow man both during his life and in his will. As evidence of definite intention upon the question of domicil this evidence is fragmentary and insufficient.

The actual facts must be considered to see if from them the intention can be gathered.

I find them inadequate to the purpose. George Bowie did not leave Glasgow in order to change his domicil; there can, I think, be little doubt he would have followed his family had they returned.

At no time had he any real attachments to Liverpool other than the presence of his brother and sisters. The ties he ultimately established were those due to inaction. He never seems to have had or exercised any volition of his own except a disinclination to move. It is true that a long continued residence may in certain circumstances show that the domicil is changed, though such intention did not originally exist. In my opinion however in this case the continued residence of George Bowie in Liverpool after his brother's death appears more probably attributable to his own lack of initiative and the disinclination of a man sixty-nine years of age to change his mode of life than to an intention to change his domicil.

Such conduct is inadequate to discharge the burden of proof cast upon the appellant. As Lord Macnaghten said, in *Winans* v. *Attorney-General* (1), an intention to change a domicil of origin "is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years."

The burden lies on the appellant to show that conduct which might reasonably be referable to such circumstances as Lord Macnaghten describes has in truth another explanation by which it is outbalanced—namely, an intention to change a domicil of origin and take a new one in its place. Notwithstanding the persuasive argument of the appellant's counsel in my opinion that burden has not been discharged.

VISCOUNT DUNEDIN. My Lords, it has again and again been laid down that a change of domicil from the domicil of origin must be made animo et facto. The factum is the bare fact of residence within the new domicil. No amount of assertion of change will be effectual if unaccompanied by actual residence. How then is the animus to be proved? It may be proved by assertion of one sort or another. It may also be inferred from the factum of residence. But in order to be so inferred the colour and characteristics of the residence as deduced from the whole story of what has happened must be taken into account. The bare fact is not sufficient. If therefore the residence is absolutely colourless and there is nothing else the animus remains unproved. I think in this case the animus remains unproved. I do not examine the evidence, because I have had the advantage of seeing the opinion which will be delivered by Lord Thankerton, and he has so exactly expressed the views on the evidence that I had formed that I should only be duplicating what he says. I concur in the motion made.

LORD THANKERTON. My Lords, the deceased George Bowie died in Liverpool, on November 5, 1927, aged 82 years and unmarried. Originally employed as a commercial traveller in Glasgow, he gave up that employment about 1882, and did no work for the rest of his life. About 1891 or 1892 he came to Liverpool, where a brother and sister were already settled, and resided in Liverpool for the remaining thirty-five or thirty-six years of his life. His domicil of origin was Scottish, and the question in the present appeal is whether he still retained that domicil at his death, or was then domiciled in England.

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(1) [1904] A. C. 287, 291.

George Bowie left a holograph will, which was made by him in Liverpool, on August 7, 1927. That will is valid according to Scottish law and invalid under English law. The appellant, as next of kin, maintains that George Bowie died domiciled in England and that the will is invalid. The respondents are the residuary legatees under the will, and maintain its validity on the ground that George Bowie retained his Scottish domicil.

Admittedly the appellant undertakes the burden of proving that George Bowie acquired an English domicil animo et facto; his long residence establishes the factum, but there remains the question of the animus. It seems clear on the authorities that mere length of residence by itself is insufficient evidence from which to infer the animus; but the quality of the residence may afford the necessary inference. For instance, the purchase of a house or estate coupled with long residence therein and non-retention of any home in the domicil of origin, might be sufficient to prove the intention to acquire a new domicil. But the long residence of George Bowie in Liverpool is remarkably colourless and suggests little more than inanition.

George Bowie went to Liverpool to live on the bounty of his brother Alexander, and, during his residence there, his means of existence were supplied by that brother and his sister Isabella. He received a legacy of 1000*l.* from the former and succeeded to the latter's whole estate on her death in 1920. He lived in lodgings until 1914, when he went to live with his sister Isabella, then the only other surviving member of the family, in a leased house, where he lived till his death. With the exception of family ties, he appears to have had few, if indeed any, ties either in Scotland or England.

Apart from residence, the evidence bearing on animus is vague and indecisive. It is not certain whether he knew that his will would be invalid in England, but he named his cousin, a Glasgow writer, as trustee, and he directed that his residuary bequests, of one-fourth each to three Glasgow infirmaries and one Liverpool infirmary, should be given anonymously as from a "Glasgow Man." He told people that he was proud to be a Glasgow man, and received a Glasgow weekly newspaper. With his sister Isabella's estate he became owner of a tenement property in Glasgow, which he desired to sell, but a bad market prevented its sale, and he retained it till his death. There is some evidence of his declining on one or two occasions to move to Glasgow and to visit Glasgow, but until 1912 he was dependent on his brother's bounty, and after 1912 it is probable that his disinclination was owing to the inertness of age and indifferent health. He was buried in Liverpool, but that was alongside of his brother Alexander and three sisters in ground for which Alexander had paid.

I am unable to find in this case sufficient evidence of a definite intention on the part of George Bowie to abandon his domicil of origin and to acquire a new domicil. The law on this subject is well fixed; the difficulty is found in its application to oft varying combinations of circumstances. The present case appears to me to be directly affected by the opinions (*a*) of Lord Westbury in *Bell* v. *Kennedy* (1), where he says: "Although residence may be some small *prima facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation"; (*b*) of Lord Chelmsford in *Udny* v. *Udny* (2), that "in a competition between a domicil of origin and an alleged subsequently-acquired domicil there may be circumstances to shew that however long a residence may have continued no intention of acquiring a domicil may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not, whether there is evidence of an intention

(1) L. R. 1 H. L. (Sc.) 307, 321; 6 M. (H. L.) 69, 78.

(2) L. R. 1 H. L. (Sc.) 441, 455; 7 M. (H. L.) 89, 98.

to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil"; and (c) of Lord Macnaghten in *Winans* v. *Attorney-General* (1), where he states: "Such an intention, I think, is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other." This last opinion appears to apply exactly to the circumstances of George Bowie's residence in Liverpool.

Accordingly, I am of opinion that the appellant has failed to prove the intention on the part of George Bowie to acquire an English domicil, and that the appeal fails.

LORD MACMILLAN (read by LORD THANKERTON). My Lords, the late George Bowie who died in Liverpool on November 5, 1927, left a holograph will dated August 7, 1927. If he was domiciled in Scotland at the date of his death that will is admittedly valid, but if he was then domiciled in England it is admittedly invalid. To determine the question of the deceased's domicil the residuary legatees under his holograph will, who are the present respondents, brought this action in the Court of Session against his niece and sole next of kin, the present appellant, concluding for declarator that the deceased was at the date of his death domiciled in Scotland. The Lord Ordinary and on a reclaiming note the First Division of the Court have so found, Lord Blackburn more than doubting but not dissenting.

In the defences to the action it was admitted that the deceased was born in Glasgow in 1845 and had a Scottish domicil of origin. The burden of proving that his Scottish domicil of origin had at his death been displaced by an English domicil of choice lay accordingly on the defender.

The acquisition of a domicil of choice is a legal inference which is drawn from the concurrence of evidence of the physical fact of residence with evidence of the mental fact of intention that such residence shall be permanent. So far as physical residence is concerned the evidence in the present case is amply sufficient. The deceased left Scotland between

(1) [1904] A. C. 287, 291.

thirty and forty years before his death and never again set foot on his native soil. During all these years, with the exception of a short visit to the United States and a holiday trip to the Isle of Man, he lived continuously in Liverpool, where he ultimately died. But residence alone is not enough. The real question in the case is whether this prolonged residence in England was accompanied by an intention on the part of the deceased to choose England as his permanent home in preference to the country of his birth. The law requires evidence of volition to change. Prolonged actual residence is an important item of evidence of such volition, but it must be supplemented by other facts and circumstances indicative of intention. The residence must answer a qualitative as well as a quantitative test.

I doubt if there was ever a case in which the Court has been asked to infer the acquisition of a domicil of choice from such slender evidence of intention as is relied on in this case. The meagre facts of the deceased's life have been analysed by the Lord Ordinary with exhaustive care, and I do not think it necessary to repeat the process which has yielded little reward. Where matters are left so inconclusive I think that the description by the deceased of himself as a "Glasgow man" in his holograph will three months before his death may be accepted as the best evidence of his state of mind. But I prefer to rest my judgment on the failure in my opinion of the appellant to discharge the burden of proof incumbent upon her.

Interlocutor of the First Division of the Court of Session in Scotland affirmed, and appeal dismissed with costs.

Lords' Journals, May 27, 1930.

Agents for the appellant: *Thomas Cooper & Co., for Russell & Duncan, Glasgow, and Patrick & James, S. S. C., Edinburgh.*

Agents for the respondents: *Alfred Bright & Sons, for Moncrieff, Warren, Paterson & Co., Glasgow, and Webster, Will & Co., W.S., Edinburgh.*

[HOUSE OF LORDS.]

M'CAFFERTY (PAUPER) . . . . . . APPELLANT;

H. L. (Sc.)*

1930

July 1.

AND

MACANDREWS AND COMPANY, LIMITED . . . . RESPONDENTS.

Workmen's Compensation—Assessment of Compensation on Failure of Action for Damages—Appeal—Reclaiming Note—Competency—Claim made within Six Months of Date of Accident—Action not brought within the Six Months—Action whether out of Time—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 14, *sub-s.* 1; 29, *sub-s.* 2.

The Workmen's Compensation Act, 1925, s. 29, sub-s. 2, provides: "If, within the time hereinbefore limited for taking proceedings under this Act, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried, or, if the determination is the determination (on an appeal by either party) by an appellate tribunal, that tribunal, shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs, which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceeding under this sub-section, when the Court or appellate tribunal assesses the compensation, it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction of costs, and such certificate shall have the force and effect of an award under this Act."

Sect. 14, sub-s. 1, provides: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof . . . . and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury . . . .":—

Held, (1.) that an appeal lies (in Scotland by means of a reclaiming note) from an order of the Court in the action assessing compensation under s. 29, sub-s. 2, but on the same principle as if the proceedings had been by arbitration—namely, that the determination is final as to fact, but is open to review as to law.

Dictum of Lord Dunedin in *Slavin* v. *Train & Taylor* 1912 S. C. 754 explained.

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* *Present:* VISCOUNT HAILSHAM, VISCOUNT DUNEDIN, LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, and LORD THANKERTON.

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(2.) Upon the construction of s. 29, sub-s. 2, in conjunction with s. 14, sub-s. 1, that the expression "within the time hereinbefore limited for taking proceedings under this Act" does not mean that the action must be brought within six months from the occurrence of the accident, but means that the claim must be made within the six months as a condition of taking proceedings for the recovery of compensation; if the conditions of s. 14, sub-s. 1, are complied with the Act imposes no limit of time within which the action must be brought.

Dicta of the Court of Appeal in *Cribb* v. *Kynoch, Ld.* (*No.* 2) [1908] 2 K. B. 551 disapproved.

Decision of the Second Division of the Court of Session in Scotland 1929 S. C. 529 affirmed on the first point and reversed on the second.

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lord Ormidale, Lord Hunter, and Lord Anderson) (1) reversing a decision of the Lord Ordinary (Lord Morison).

The following statement is taken from the opinion of Lord Warrington of Clyffe :—

The appellant was a fireman and greaser on board the *Carpio*, a ship belonging to the respondents on a voyage to ports on the coast of Spain. In the course of the voyage, on September 12 or 13, 1926, the appellant contracted para-typhoid fever under circumstances which in the opinion of the Lord Ordinary justified a claim for compensation for injury by accident arising out of and in the course of his employment under the Workmen's Compensation Act, 1925. On February 17, 1927, he duly preferred a claim to compensation. On March 23, 1927, he commenced the action in which this appeal arises. In that action he claimed damages at common law, founding on the alleged negligence of the respondents as a consequence of which the water supplied to the crew became contaminated and conveyed the infection to the appellant and certain other members of the crew. The action was tried before Lord Morison and a jury on February 28, 1928, and two following days. The jury returned a verdict which in the opinion of Lord Morison amounted to a verdict for the defenders. In due time, according to Scotch practice, the appellant moved the Court to dismiss the action and to assess compensation under the Workmen's

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(1) 1929 S. C. 529.

Compensation Act, 1925, in the terms of s. 29, sub-s. 2, of that Act.

On March 20, 1928, Lord Morison pronounced an interlocutor whereby he applied the verdict and dismissed the action; and having heard the parties on the defenders' motion for expenses reserved all questions of expenses and gave directions for the lodging of a statement of claim to compensation and of answers thereto.

This claim was heard by Lord Morison on May 24 and 25, 1928; and on June 6, 1928, he pronounced an interlocutor whereby he repelled the defenders' objection to the competency of the application by the pursuer to have the amount of the compensation to which he was entitled under the Workmen's Compensation Act, 1925, assessed by the Court, found that the typhoid fever contracted by the pursuer was an injury by accident arising out of and in the course of his employment with the defenders and that the typhoid fever caused the pursuer to be totally incapacitated from September 13, 1926. He then made an award of compensation at the rate therein specified and found the defenders liable to the pursuer in the expenses of the cause and of the said application to the extent of one-half of the taxed amount thereof, and appointed a certified copy of the interlocutor to be issued as a certificate of the award within the meaning of s. 29, sub-s. 2, of the Act.

The respondents appealed from this interlocutor to the Second Division of the Court of Session who by their interlocutor in effect allowed the appeal and dismissed both the claim to compensation and the action with costs.

1930. May 20, 22, 23. *Carmont K.C.* (of the Scottish Bar) (with him *J. L. Clyde* (of the Scottish Bar) and *T. Elder Jones* (of the English Bar)) for the appellant. An interlocutor of the Lord Ordinary assessing compensation under s. 29, sub-s. 2, of the Workmen's Compensation Act, 1925, after an action for negligence has failed is not open to review and the reclaiming note is therefore incompetent. The right to compensation is purely statutory and has no basis in common law. The whole proceedings relating to an award are therefore statutory and outside the common law action. The judge in assessing compensation is acting as arbitrator, and the certificate given by the judge under the above enactment has the force of an award under the Act. The Act provides a complete code regulating the conditions and incidents of the right to compensation. In particular it contains express provisions regulating the right of appeal. So far as Scotland is concerned these provisions are contained in s. 49 and relate only to applications to the Sheriff as arbitrator. Where the claim comes before the Sheriff in the ordinary course the mode of appeal provided by the Act is by stated case. Where no stated case is possible no other statutory appeal is given. The statutory form of appeal cannot be imported, because it is not applicable to a case of this kind: *Slavin* v. *Train & Taylor* (1); *Stewart* v. *Perth General Station Committee* (2); *Perth General Station Committee* v. *Stewart*. (3) It may be that an analogy is to be found in the English practice (see *Cattermole* v. *Atlantic Transport Co.* (4); *Williams* v. *Army and Navy Auxiliary Co-operative Society* (5)), but for the purposes of this appeal it is sufficient to deal with the practice in Scotland, which is specially dealt with in the Act. Assuming that the respondents' reclaiming note was competent, the next question is whether the action was brought within the time specified in s. 29, sub-s. 2, of the Act so as to entitle the appellant, on the failure of that action, to ask the Lord Ordinary to assess compensation. That sub-section requires that the action should have been brought "within the time hereinbefore limited for taking proceedings under this Act." That refers to s. 14, sub-s. 1, which provides, so far as material to the present case, (see s. 35, sub-s. 1 (*a*)), that "proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless . . . . the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury" subject to a proviso that the failure to make the claim within the stipulated period shall not be a bar to the

(1) 1912 S. C. 754.
(2) 1923 S. C. 356.
(3) 1924 S. C. 1004.
(4) [1902] 1 K. B. 204.
(5) (1907) 23 Times L. R. 408.

maintenance of the proceedings where the failure was occasioned by mistake or other reasonable cause. The result is that if the claim is made within the six months, as it was in this case, the action may be brought at any time and it is unnecessary to have recourse to the proviso in s. 14. It is said, however, by the respondents that under s. 29, sub-s. 2, the period within which the action must be brought is a fixed and unalterable period of six months, and *Cribb* v. *Kynoch, Ld.* (*No.* 2) (1), is cited in support of that contention. That case decided that a plaintiff who had brought a common law action which failed could not after that action had been finally disposed of take arbitration proceedings under the Act under the same claim, and, although some of the judges expressed the view that the action must have been brought within the six months, the point did not arise for decision and their dicta were obiter only. There is nothing in the Act to justify that construction, and if the Legislature had intended to distinguish between the periods allowable under s. 14 and s. 29, sub-s. 2, this could easily have been effected by saying " If within six months from the date of the accident an action is brought." As to the merits, there is no question for the appellant to meet, as the judges of the Second Division were equally divided. As to expenses, the exercise by the Lord Ordinary of his discretion in this matter should not be interfered with in the circumstances.

Craigie Aitchison L.A. (with him *Gordon Thomson* (of the Scottish Bar) and *Waldo R. Briggs* (of the English Bar)) for the respondents.

The first question upon this appeal is whether the reclaiming note was competent. The second question is whether the appellant's claim was competent in respect that the common law action was not timeously raised. As to (1.), there is no doubt that the interlocutor was pronounced in the common law process, whether the learned judge was acting as a judge or as a quasi arbitrator in determining the liability under the statute. Sect. 29, sub-s. 2, of the Act refers to the determination of the statutory liability in the

(1) [1908] 2 K. B. 551.

common law action; why then should that not be subject to review? To say that the determination of the statutory liability is something outwith the action is to ignore what the Act says. What is now under consideration is a final interlocutor pronounced by a judge in his ordinary judicial capacity, and that is open to review unless excluded by express enactment. If the respondents are right in saying that the action was not timeously raised the Lord Ordinary was assuming a jurisdiction which he did not possess, and it would be a strange thing if the parties against whom that jurisdiction was exercised were to be deprived of all remedy. One result of holding the reclaiming note incompetent would be that a workman who brings on abortive action of negligence would be in a better position if the judge decided the question of compensation in his favour than a workman who had started compensation proceedings in the first instance. If the common law liability is subject to review it is anomalous that the statutory liability which is to be determined in the common law action should not also be subject to review. *Slavin* v. *Train & Taylor* (1) is not an authority for the proposition that an appeal is excluded. The question did not arise in that case and Lord Dunedin, when he said that no appeal lay from the determination of the statutory liability by the Lord Ordinary by way of stated case, was not intending to lay down that review in some form was not admissible against that determination. *Stewart* v. *Perth General Station Committee* (2) carries the appellant no way at all. Lord Cullen laid it down that whether the action and the assessing of compensation engrafted on it proceeded in the Court of Session or in the Sheriff Court, the Lord Ordinary or the Sheriff, in assessing compensation, did not act as arbitrator, but by virtue of the Court being seised of the action of damages on which the process of assessing compensation was grafted. Lord Sands reserved his opinion as to whether all review was excluded. As to (2.), the question whether the appellant's claim was a competent claim turns upon the construction

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(1) 1912 S. C. 754.

(2) 1923 S. C. 356, 363, 364.

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of s. 29, sub-s. 2, read in conjunction with s. 14, sub-s. 1. The remedies of the workman are alternative and not cumulative. Sect.29 gives the workman a choice between the two remedies, by action or by arbitration proceedings, but by sub-s. 2 provides a locus poenitentiae if he proceeds by action and fails. But the common law action must have been raised within the time limited for taking proceedings under the Act. In the respondents' submission proceedings under the Act mean making a claim. The claim having been made within six months from the date of the accident the appellant had the right to proceed if he proceeded under the Act, but in invoking s. 29, sub-s. 2, the question is not whether he could have proceeded under the Act in the ordinary course and the action must have been brought within the time thereinbefore limited for taking proceedings, that is, six months from the date of the accident plus an extension on cause shown. "Time limited" does not mean time indefinite. On the opposite view a workman, if he made his claim within the six months, might bring an action any time within the six years allowed by the Statute of Limitations, and on the failure of that action might then take proceedings under the Workmen's Compensation Act. That would be to inflict a very serious hardship on the employer. The construction for which the respondents contend was adopted by all the judges of the Court of Appeal in *Cribb* v. *Kynoch, Ld.* (*No.* 2) (1). The effect of the appellant's construction is to emasculate the sub-section, because no effect is given to the word "limited." If that word is to have any meaning, the only time condition that can be imported is the six months.

[Counsel also contended on the merits that the evidence was insufficient to support the conclusions of the Lord Ordinary and that his order as to the costs was not justified.]

[Viscount Hailsham intimated that their Lordships did not desire to hear a reply on the merits or on timeousness. That left only the competency of the appeal and the costs. Their Lordships proposed to give no costs of the proceedings in the Courts below.

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(1) [1908] 2 K. B. 551.

Carmont K.C. not wishing to contest further the competency of the appeal and accepting the proposal as to costs, no reply was called for.]

The House took time for consideration.

1930. July 1. Viscount Dunedin (read by Viscount Hailsham). My Lords, the pursuer appellant was a sailor on a ship belonging to the respondents. At the port of Malaga where the ship touched he became ill of typhoid fever. He was taken on to Barcelona and put in hospital there. He was eventually sent home overland and went to Glasgow, where he was again put in hospital. After leaving the hospital he was two months at his own home, and he then rejoined his ship. Shortly afterwards he was again taken ill and was discharged. All this illness was the result of the typhoid fever. The date of the fever and disablement thereby, viewed as an accident, was September 13, 1926. He intimated a claim under the Workmen's Compensation Act on February 17, 1927. He did not proceed to arbitration in respect of that claim, but raised action at common law against his employers, the respondents, on March 23, 1927, alleging negligence. The action was tried before a jury presided over by the Lord Ordinary. The jury answered certain specific questions and left it to the judge to enter the verdict. The judge entered the verdict in favour of the defenders. Thereupon the pursuer moved the Lord Ordinary to assess compensation under the provisions of s. 29, sub-s. 2, of the Workmen's Compensation Act. The Lord Ordinary suggested to the pursuer that he should lodge a minute. Accordingly a minute was lodged in these terms:

"Clyde for the pursuer craved and hereby craves the Court to dismiss the action and to assess compensation under and in terms of the Workmen's Compensation Act, 1925."

Upon this the Lord Ordinary pronounced the following interlocutor:—

"The Lord Ordinary, of consent, applies the verdict in the trial of the cause, dismisses the action, and, having heard parties on the motion of the defenders for expenses, hoc statu reserves all questions of expenses: Appoints the pursuer to lodge a statement of his claim under the Workmen's Compensation Act, 1925, by the first box day in the ensuing vacation, and the defenders to lodge answers thereto by the second box day: Authorises the parties to obtain access to the shorthand notes of the evidence in the cause, in order that they may make such excerpts therefrom as they may require."

Upon that the pursuer lodged a statement of claim. This statement merely repeated the facts as to the voyage and the illness which had been stated in the action, and made a claim in money for compensation. The plea at law attached to the statement was:

"The pursuer, having suffered personal injury by accident arising out of and in the course of his employment with the defenders as above stated, is entitled to compensation as claimed."

The defenders answered the statement; and their pleas, so far as material, were:

"(1.) Ante omnia, the pursuer's claim is irrelevant, and cannot now be insisted in, in respect the present action was not timeously raised.

(4.) The personal injury (if any) from which the pursuer is suffering, not being by accident arising out of and in the course of his employment, with the defenders, they are not liable to pay compensation therefor."

Neither party moved for further inquiry by way of proof. After a debate the Lord Ordinary pronounced this interlocutor:

"The Lord Ordinary having considered the statement of claim for the pursuer, No. 53 of process, and the answers thereto for the defenders, No. 58 of process, repels the defenders' objections to the competency of the application by the pursuer to have the amount of compensation, to which he is entitled under the Workmen's Compensation Act, 1925, determined by the Court, finds that the typhoid fever contracted by the pursuer was an injury by accident arising out of and in course of his employment with the defenders;

that said typhoid fever caused the pursuer to be totally incapacitated from September 13, 1926; accordingly makes an award in favour of the pursuer of compensation at the rate of thirty shillings (30*s.*) per week from September 17, 1926, until further orders of Court, subject to deduction of the sum of 10*l.* sterling paid by the defenders to the pursuer; and having considered the question of expenses finds the defenders liable to the pursuer in the expenses of the cause and of the present application to the extent of one-half of the taxed amount thereof, and remits the account of the said expenses to the auditor to tax and to report; appoints a certified copy of this interlocutor to be issued as a certificate of the above award within the meaning and intent of s. 29, sub-s. 2, of the said Act."

Against this interlocutor the defenders reclaimed. At the hearing of the reclaiming note the pursuer submitted that the reclaiming note was incompetent, and if that were found against him, that the Lord Ordinary's interlocutor was well founded. The judges of the Second Division pronounced this interlocutor:

"The Lords having considered the reclaiming note for the defenders against Lord Morison's interlocutor dated June 6, 1928, and heard counsel for the parties, Repel the objection stated for pursuer to the competency of the reclaiming note: Recal the said interlocutor: Repel the pursuer's claim No. 53 of process for compensation under the Workmen's Compensation Act, 1925: Recal also the interlocutor of the Lord Ordinary, dated March 20, 1928, in so far as it dismisses the action: Assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses against the pursuer in the whole cause and proceedings, but excepting expenses incurred in connection with the Procedure Roll discussion, and remit the account to the auditor to tax and to report."

Against that interlocutor the present appeal is taken. The counsel for the appellant at once raised what is clearly the first question to be decided—namely, the competency of the reclaiming note; for if it was incompetent, the interlocutor of the Lord Ordinary must necessarily stand. It is, however, before discussing that question, necessary to point out that the reclaiming note dealt with two perfectly different things. It dealt with that portion of the Lord Ordinary's interlocutor which repelled the objection to competency based on the plea that the claim for compensation could not be made as the action was not timeously raised. And it dealt secondly with what may be called the merits of the claim for compensation. The appellant's counsel relied strongly on the case of *Slavin* v. *Train & Taylor* (1), and it will be well at once to see what was decided in that case. Slavin, a worker in the employment of the defenders, raised an action at common law against them for damages for personal injury. The case was tried by a jury over which I presided, and the jury found for the defenders. The pursuer took a Bill of Exceptions against portions of my charge. That Bill was heard by the First Division, I being present not as President of the Division, but in my capacity of presiding judge at the trial. The Bill was refused. Counsel for the defenders then moved to apply the verdict, whereupon counsel for the pursuer asked the Court in terms of s. 1, sub-s. 4, of the Workmen's Compensation Act, 1906, to assess the compensation due to him in respect of the injury suffered. Sect. 1, sub-s. 4, of that Act is practically in identical words with s. 29, sub-s. 2, of the present Act of 1925. The defenders argued that the motion was incompetent on the obviously untenable ground that the section only applied to actions raised in the Sheriff Court, and also upon the ground that the motion should have been made the moment the verdict was given, but they did not contend that the accident did not arise out of and in the course of the employment. Upon this, the following opinion was delivered :

" The judgment of the Court is that in such cases the motion for assessment of compensation under the Workmen's Compensation Act must be made before the verdict is applied and if not so made it will be too late. The motion when made will entitle the party making it to an enquiry as to whether,

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(1) 1912 S. C. 754.

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in the first place, in cases where this is doubtful, the accident in question arises in the course of and out of the employment; and, in the second place, as to the amount of compensation due. It cannot be supposed that the defender could come to the trial in a state of preparation as to the question of the amount due, because he does not know whether the option of claiming compensation will be exercised by the pursuer in the event of the trial resulting in a verdict against him. Accordingly, if the motion is made in time either the Lord Ordinary before whom the case is tried, or one of the judges of the Division, must act in the same way as an arbitrator, except that there would be no appeal from him by way of stated case."

The pursuer then said that there was sufficient evidence in the judge's notes to allow of the compensation being fixed. After the delivery of that opinion, no further interlocutor was then pronounced, but the case was continued to see whether the parties, there being no question between them as to the case being a proper case for compensation, could adjust the amount due. They did adjust the amount and put in a minute to that effect, and in terms of that minute the following judgment was pronounced:

"Disallow the exceptions: Of consent apply the verdict of the jury, and in respect thereof dismiss the action and decern: Find the defenders entitled to expenses . . . . Further, having heard counsel on the motion of the pursuer for a finding and award under the Workmen's Compensation Act, 1906, find that the pursuer is entitled to compensation under said Act: Interpone authority to the joint minute for the parties . . . . and in terms thereof make an award; . . . . Appoint a certified copy of this interlocutor to be issued as a certificate of the above award, within the meaning and intent of s. 1, sub-s. 4, of the said Act."

Turning now to the present case, the appellant naturally founds on the sentence: "Except that there would be no appeal from him by way of stated case."

It will be apparent that even if that was right it could form no ground for refusing an appeal against the judgment repelling the objections to the competency, for if the objection was good there was no foundation for the motion and the whole proceedings following on that motion were fundamentally bad. But as regards the appeal on the merits, the sentence has an application.

I have come, after the full discussion that has now been held, to the opinion that although all that was done in *Slavin's* case was quite right, yet that sentence was ambiguous. It might be thought that it indicated that no appeal at all was possible. I will therefore now go at once to the section of the statute on which the matter depends—namely, s. 29, sub-s. 2.

"If, within the time hereinbefore limited for taking proceedings under this Act, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed ; but the Court in which the action is tried, or, if the determination is the determination (on an appeal by either party) by an appellate tribunal, that tribunal, shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs, which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceedings under this sub-section, when the Court or appellate tribunal assesses the compensation, it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction of costs, and such certificate shall have the force and effect of an award under this Act."

Now, it has to be remembered that the preceding sub-section has forbidden the workman to launch both proceedings at once. This sub-section deals with the case where he has elected to launch the common law proceedings. Passing over for the present the time limit as to the raising of the action, to which I shall presently revert, it is to be noticed

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that it is a determination in the action which is to fix two things, first, the non-liability of the employer at common law (of course in that expression I include liability under the Employers' Liability Act), and second, that he would have been liable to pay compensation under the Act, that is to say, if proceedings had been raised under the Act. That points obviously to this, that while the action is still alive, the determination should be reached. Now, that determination can only be made by the judge in the action, or by the judges in the Court of Appeal, if the action has reached them. If the defender denies that the situation was such as to raise a question of compensation under the Act, that question must be tried, and, if the decision is adverse to either party, such party, it would be expected, would have the right of appeal, and the only right of appeal from the Lord Ordinary with a jury, or from a judge holding proof, is by reclaiming note to the Inner House.

It is here that I am satisfied that the opinion I expressed in *Slavin's* case when I said there would be a determination, first, of the question whether there was a proper accident arising in the course of and out of the employment, and, second, as to the amount of compensation, and that from that decision there would be no appeal by stated case was ambiguous. The decision being given, dismissal of the action is to follow, and here I may say that I agree with what Lord President Clyde said in another case that the word "dismiss" is not used in the technical sense in Scottish proceedings but includes absolvitor when that is the appropriate interlocutor. But now I have to consider what is to be done on that appeal. The matter ends by the pecuniary amount being settled and a certificate being granted on which diligence may proceed. That convinces me that the suggestion made by my noble friend, Lord Buckmaster, in the course of the case is really the solution of the difficulty. There is appeal, but on that appeal the criterion is the same as when proceedings of arbitration are taken by the Sheriff in the ordinary way. There the appeal is raised by stated case, that is to say, the determination is final as to fact, and is only open to review as to law. This seems to me to make the whole Act intelligible and workable without the extreme consequences which either denial of appeal on the one hand, or absolute unfettered appeal on the other, would lead to.

Expressing this opinion in terms of interlocutors I think the course of procedure should, in a case of this kind, be as follows:

When a jury has returned a verdict, or the Lord Ordinary after a proof has delivered a judgment which would lead to dismissal or absolvitor, the pursuer must make his motion, and that being made, the defender must say whether he admits that the accident arose out of and in the course of the employment. If he does not admit that, the Lord Ordinary will settle whether he has sufficient material before him to decide the question, or whether he requires further evidence, and so also as to the amount of compensation to be found due. These points being settled, he will pronounce an interlocutor of dismissal or absolvitor and a further interlocutor dealing with the merits of the compensation case. This interlocutor will be appealable by reclaiming note. If the verdict of the jury, or the judgment of the Lord Ordinary is in favour of the pursuer and is reclaimed against, then the same procedure, mutatis mutandis, would be followed in the Inner House.

Now, reverting to the present case, and putting aside the fact that the Lord Ordinary's interlocutor of March 20, though wrong in form, yet decided the questions, the result is that the reclaiming note was not incompetent, but raised competently the two questions, (1.) of the timeousness of the whole procedure, and (2.) if that objection was repelled, of the merits of the decision dealing with the question of the Workmen's Compensation Act.

The first question depends upon whether this action was raised within the time limit for taking proceedings under the Act. The Second Division has held that it was not, because it was not raised within six months after the occurrence of the accident. I do not agree with this view. To find out what is the time limit we must go to s. 14, sub-s. 1, which is as follows:

"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. . . ."

Now this section does not say that proceedings must be brought within six months. It only says that proceedings shall not be maintainable unless two conditions have been complied with, (1.) the giving of notice as soon as possible, and (2.) the making of a claim within six months. Here a claim was made within six months—namely, in February, 1927—and as soon as that claim was made further proceedings became maintainable and continued maintainable thereafter until put an end to. The action was therefore within time. Counsel for the respondents argued that it would permit the workman to make a claim, then do nothing more, and perhaps put off the action for several years, thus keeping his claim alive all that time. The answer is easy. If a workman makes a claim and does nothing, the employer may apply for arbitration so as to put an end to the claim one way or other. If he did so, that would at once force the hand of the workman, for if he allowed the proceedings in arbitration to go on he would forfeit his right of action by virtue of s. 29, sub-s. 1, which makes double proceedings impossible. The moment the employer applied for arbitration the workman would have to raise his action which would thus extinguish the power of going to arbitration under the claim, leaving him the rights given under s. 29, sub-s. 2, i.e. to, so to speak, reconstitute the claim as is done in this action.

Our attention was called to the expressions used by the English judges in the case of *Cribb* v. *Kynoch, Ld.* (*No.* 2). (1) That case is not binding on me. I have the greatest respect for the learned judges who formed the Court, but in truth the

(1) [1908] 2 K. B. 551.

answer to it is that they had no occasion to consider the question as it now arises. The judgment in that case was clearly right. The plaintiff had taken no steps in accordance with the provisions of the section which correspond with s. 29, sub-s. 2, but having lost the action, tried to begin new arbitration proceedings under the original notice and claim. This it is obvious he could not do, and the question which arises from the decision here did not and could not arise.

So much for the objection to the competency of the proceedings. There remains only the question of the merits. As to that, on the criterion above stated, there is obviously no ground for sustaining an appeal. Even without that, as the whole point turned on whether the workman went ashore or not, and the Lord Ordinary, who tried the case, believed him when he said he did not, a result concurred in by two of the judges of the Court of Appeal, I do not think your Lordships would think of disturbing the judgment.

There remains the question as to expenses. Now, the sum total of the position is that the appellant failed in the action at common law, but gained on the question of its being an accident arising out of and in the course of his employment, a point which necessitated an inquiry into the facts. In these circumstances, I think there was no justification for finding the respondents liable, as the Lord Ordinary did, but I think justice will be done by giving no expenses to either party in the action and proceedings. This leaves no question open as to possible deduction. The appellant must have the expenses of the appeal to this House, as it was itself substantially successful, but they will be only such as are properly given in pauper cases.

The proper order for this House to make is, in my opinion, to reverse the interlocutor appealed against, and to remit to the Court of Session with instructions to them of new to repel the objections to the competency of the reclaiming note; to recall the interlocutor of the Lord Ordinary; to assoilzie the defenders from the conclusions of the summons. Further, to find that the typhoid fever contracted by the pursuer was an injury arising out of and in the course of his employment, and to award him compensation at the rate determined by the Lord Ordinary, and to find neither party entitled to expenses.

VISCOUNT HAILSHAM. My Lords, I have only to add that, having had the advantage of reading this opinion before it was delivered I find myself in complete agreement with Viscount Dunedin's reasons and conclusions.

LORD BUCKMASTER (read by LORD THANKERTON). My Lords, the facts of this case have already been fully stated. The questions to which they give rise are three—

(1.) Did the appellant suffer an injury arising out of and in the course of his employment with the respondents ;

(2.) Was his claim for compensation defeated by the procedure he adopted ;

(3.) Was the finding of the Lord Ordinary final and incapable of being reviewed.

The order of these questions is not necessarily the strict one for their consideration, but it is to my mind the most convenient.

I have no doubt that (1.) must be answered in the affirmative.

In my opinion it depends wholly on whether there is good reason to displace the finding of the Lord Ordinary that the appellant never left the ship from the date of joining it at Swansea on August 28, 1926, to the time when he reached Malaga on September 12. For if this finding be accurate then beyond all doubt the disease was contracted during the voyage, and as it must have been conveyed by food or drink which, as part of the appellant's terms of service, the respondents were bound to provide, it must have arisen both out of and in the course of his employment.

I notice that in the judgment of Lord Hunter it is stated that the period of infection might have extended to a period before August 25 when the pursuer joined the ship, but the fact that five men of the crew were all seized simultaneously with the disease points irresistibly to the conclusion that the source was common to them all, and must have arisen during the voyage. Disregarding for the moment the question whether the finding of the Lord Ordinary has the effect of an award, and treating it as the decision of a judge and not of an arbitrator, I can see no reason for disturbing his conclusion.

The evidence upon the matter is of the simplest kind. The pursuer swore he never left the ship and assigned as reason his lack of cash. Enoch James, who was a steward on the boat, on the other hand said he was quite clear he saw him with three others at a café at Seville on September 9, he also admitted he had had a disagreement with the pursuer and refused to answer his solicitor's request for information.

The doctor spoke generally as to all the sick men stating that they went ashore. His evidence was not specific and he was never asked the question whether the pursuer himself had said he was there.

The Lord Ordinary accepted the pursuer's statement and in these circumstances it would to my mind be imprudent and indeed contrary to the usual practice to override his judgment. If reasoned argument were necessary to support his finding, it is, I think, to be found in this—that, granting good faith on both sides a man is more likely to be accurate who swears he did not leave a ship than the man who says he saw him with several others and has no special circumstances by which to fortify his memory.

As to the possibility of infected food being brought on to the boat, there is no evidence that any food was so brought, and if it were there is no evidence the pursuer touched it.

I pass, therefore, to the other questions. At the time of instituting the proceedings for negligence, the pursuer had given notice of his claim and was in a position to enforce his remedy under the Workmen's Compensation Act.

The election to proceed at common law might have jeopardized this right, but, recognizing this fact, the Legislature has expressly provided that under certain conditions the alternative remedy may be kept alive. The contention of the respondents is that this privilege is associated with a penalty

—namely, that the common law proceedings must have been instituted not merely within the time open for proceedings under the statute, but within a fixed period of six months from the date of the accident, subject to possible extensions provided for in s. 14, sub-s. 1 (*b*). Such extensions could not operate here as they relate only to the claim, and that was made within six months.

According, therefore, to the respondents' contention, the common law action must be begun within six months of the accident unless the workman has failed to give notice within this time, in which case the extensions permitted by s. 14. sub-s. 1 (*b*), operate. It is plain that the whole of this reasoning with its strange conclusion that prompt obedience to the statute as to making a claim puts a workman in a worse position than if he had been dilatory, depends upon the assumption that giving notice of a claim is "taking proceedings" under the Act, an interpretation of the statute which I cannot accept. It appears to me to confuse two different things—an act which must be a condition precedent to taking proceedings, and taking the proceedings themselves. The case of *Cribb* v. *Kynoch, Ld.* (*No.* 2) (1), does not really advance the respondents' case since there the workman had proceeded at common law and after the action was dismissed had begun de novo proceedings under the Act. It is unnecessary to examine that case more closely, since its facts differ from those in the present case in a material respect. Here we have only to determine what is meant by the limitation contained in s. 29 where the common law action is still alive.

In my opinion the meaning is that if, when the common law action is begun, proceedings were open under the Workmen's Compensation Act so that the workman thus enjoyed two alternative remedies, the fact that the common law remedy is selected does not defeat the other but leaves it open to be determined in the common law suit.

The method of determination is not clear, but in my opinion the section specially contemplates that the actual determination

(1) [1908] 2 K. B. 551.

of the liability under the Workmen's Compensation Act takes place in the common law action; for the provision as to dismissal of the action follows on such determination and for this purpose the action must be kept alive. When this has been done the judge is directed to assess the compensation and to issue a certificate which is to have the effect of an award. Now if this be regarded as a wholly independent proceeding, there would be, as the appellant says, no appeal at all, for the provisions as to a special case do not apply and there is no inherent appeal against an award at all.

Rights of appeal are not inherent rights—they are attached by statute to certain Courts exercising certain jurisdiction, but if a totally new jurisdiction is established it carries with it no right of appeal unless it arises through the jurisdiction being conferred on existing Courts so as to make the new matter subject to the already existing rights of appeal. The true view, I think, is that the assessment of the amount which is the corollary of the determination of liability takes place just as the determination of liability itself in the common law action, and the award of the amount is embedded in the interlocutor in the action, but being an assessment under the Act to which interlocutors are inapplicable, it must be regarded as possessing the qualities of an award in this respect—that on appeal from the interlocutor the arguments open are only those that would be permitted on an award.

This view seems to me to be supported by considering the question as if the point arose on appeal. If the workman has succeeded in the first instance in the common law suit, and the employer successfully appeals, upon this appeal the Court of Appeal can itself determine the question of liability, and the amount of compensation under the Workmen's Compensation Act. I can see nothing to suggest that two interlocutors are thus required. I think the Lord Ordinary was right in his interlocutor of June 6, wherein he awarded compensation and appointed a certified copy "to be issued as a certificate of the award," but I agree with the views expressed in the Court of Session that the Lord Ordinary did not proceed strictly, for he ought first to have determined the question of liability, then to have dismissed the common law action, and then to assess the compensation and dispose of the costs and for all this one interlocutor would have sufficed.

The examination of *Slavin's* case (1) by Lord Dunedin renders it unnecessary for me to add any further comment on that case.

I agree as to the proposed motion with regard to costs and this renders unnecessary an examination of whether the Lord Ordinary's judgment on the point was rightly overruled.

Apart from the question of time on which I have expressed my opinion, I find myself in close agreement with the judgment of the Lord Justice-Clerk.

Lord Warrington of Clyffe. My Lords, this is an appeal from an interlocutor of the Second Division of the Court of Session reversing an interlocutor of the Lord Ordinary in favour of the appellant, the pursuer in the action. The respondents are the defenders in the action. The appellant has obtained leave to prosecute this appeal as a pauper. [His Lordship stated the facts as above.]

Four points were discussed in the Second Division and in this House. First it was contended by the present appellant that the appeal to the Second Division was incompetent. This point was decided in favour of the present respondents by all the judges of the Second Division. Secondly, the respondents contended that the appellant's case did not fall within s. 29, sub-s. 2, of the Act, for that the action was not commenced in due time. This point was decided in favour of the respondents by all the judges except Lord Hunter who found it unnecessary to decide the question, as he was in favour of the respondents on the merits. Thirdly, the respondents maintained that the Lord Ordinary arrived at a wrong conclusion on the facts. On this point their Lordships were equally divided, and but for the decision on the second point, the interlocutor of the Lord Ordinary would have stood. Fourthly, the respondents attacked the decision of the

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(1) 1912 S. C. 754.

Lord Ordinary as to costs and on this point their Lordships unanimously decided in their favour.

I will now deal with these four points in order. On the first I agree with the decisions of their Lordships of the Second Division, but the question is one of some importance and I will state my views in my own words as shortly as possible.

The question is one of the true construction of a certain section of the Act, and I will deal with it first without reference to authorities.

Sect. 29 is the section in question. By sub-s. 2 provision is made for preserving alternative claims of the workman under the ordinary law and conferring on him an election between such claims and a claim to compensation under the Act, with the condition that the employer shall not be liable to pay compensation both independently of and under the Act. Sub-s. 2 is as follows: [His Lordship quoted the sub-section.]

It is contended by the appellant that all the proceedings under this sub-section subsequent to the determination that the injury is one for which the employer is not liable in the action, are outside the ordinary jurisdiction of the Court and are not subject to the ordinary rights of appeal attached to that jurisdiction, and he relies in confirmation of his view on the concluding words of the sub-section giving to the certificate the force and effect of an award.

In my opinion this is not the correct view of the section. Two points are to be determined by the Court: first, that the injury is not one for which the employer is liable in the action; and secondly, that he would have been liable to pay compensation under the Act. Then it is the Court which is to assess compensation and deal with the costs. In my opinion the whole matter is to be dealt with by the Court as such, and it is impossible to make any distinction in this respect between the original claim and that for compensation. The claim for compensation, not originally a ground of action, is by statute to be treated as if it were made in the action, and the ordinary right of appeal attaches to this matter as well as to those actually covered by the action. The contention that the provision as to the force and effect of the certificate has the effect of excluding an appeal seems to me insupportable. It is to have the force and effect of an award—viz., it is to be enforced or otherwise dealt with as, e.g., by increase, diminution or determination just as an award might be, but this provision has no bearing on the order in pursuance of which the certificate is issued. This is in my view subject to ordinary rights of appeal, because under the statute it is an order in the action and pronounced under the ordinary jurisdiction of the Court as supplemented by the statute. As to the authorities, the direction of the Court in *Slavin's* case (1) is entirely in accord with this view. The application to deal with the question of compensation is to be made before the verdict is applied, and therefore while the action is still pending, and it is pointed out that the applicant will then be entitled to have settled both the question whether his claim is within the Act, and the amount of the compensation. The learned Lord President adds that the judge will act in the same way as an arbitrator except that there will be no appeal from him by way of special case. This is entirely in accord with the view that the judge will act in his capacity as judge, and his order will be appealable to the same extent, and by the same procedure, as those in any ordinary proceedings in Court. This opinion is supported by the form of interlocutor pronounced. The two cases, *Stewart* v. *Perth General Station Committee* (2) and *Perth General Station Committee* v. *Stewart* (3), seem to me to support the opinion I have above expressed.

The second point also raises a question of construction. On this, with all respect, I am unable to agree with those of their Lordships who held that the action was out of time and was therefore not within s. 29, sub-s. 2. The claim was duly made within six months after the injury—namely, on February 17, 1927, and the action was commenced on March 23, more than six months after the date of the injury. It is said

(1) 1912 S. C. 754.
(2) 1923 S. C. 356.
(3) 1924 S. C. 1004.

that unless the action as well as the claim is made within the six months it is not within the section. Again, in this case I will endeavour to construe the section without reference to authority. The condition of the applicability of the section is expressed in the terms "if within the time hereinbefore limited for taking proceedings under this Act an action is brought." The expression "taking proceedings under this Act" seems to me to have the meaning which I venture to think is familiar to all lawyers, and to apply only to those steps which according to the law applicable to the particular case initiate the process by which the claimant seeks to recover what he claims to be due to him, and cannot include a claim to compensation. Under the Act the making of a claim is one of the conditions of the right to maintain the proceedings. It has been settled that it need not be in any particular form and need not even be in writing. The claim seems to me analogous to the not uncommon precursor of proceedings, a letter before action, rather than to the institution of the action itself. The distinction is emphasized by the fact that the claim is mentioned in s. 64; the first of a fasciculus of sections headed "Conditions of compensation." The proceedings themselves are dealt with in a fasciculus of sections headed "Procedure for determining compensation and settling questions." In England under Rules of Court these proceedings are initiated by a request for arbitration, and this request may be preferred either by the workman (r. 8) or by the employer (r. 10), and the employer is thus protected against undue delay on the workman's part. I gather that in Scotland the proceedings begin by an application to the Sheriff. It has not been suggested that this can be made only by the workman. The result is that in the Act there is no provision by which the time is limited for taking proceedings under the Act, because I apprehend it was considered unnecessary so to provide. The learned judges in the Court of Session have thought themselves justified in reading "time limited for taking proceedings" as if it had been "time limited for making the claim." I cannot think this view is justified. The purpose of the section is obviously to secure that the claim for compensation referred to therein is at the time when the action is commenced a live claim capable of being maintained and prosecuted. This was so in the present case, for on March 23, 1927, the date of the commencement of the action, either party could have applied to the Sheriff for an arbitration. In my opinion therefore the section should be read as it stands and so read the action was commenced in due time, and the condition of s. 29, sub-s. 2, in this respect was fulfilled. If in the result the words of the section do not carry out the intentions of the Legislature, the mistake should be remedied by them and not by the Courts.

I am aware of course that I am differing from views expressed by very learned judges in *Cribb* v. *Kynoch, Ld.* (*No.* 2). (1) In that case the question did not arise, for the applicant for compensation there had commenced an action for damages under the law independently of the Act and had been defeated. She had not in that action sought to avail herself of the provisions of s. 29, sub-s. 2, and it was held that she had finally elected and could no longer maintain a claim for compensation. It is true that the judges referring to the corresponding section to s. 29, sub-s. 2, said that the time limit for an action within the sub-section was six months from the accident, but it appears from a reading of the report that this point was assumed without argument or discussion of any kind. Your Lordships are of course not bound by the views so expressed, but I venture to think that in the present case we may have less hesitation in overruling them than we should have had had they been the result of serious discussion on a point necessary for decision. I am of opinion therefore that in this case the action came within the provisions of s. 29, sub-s. 2, and the claim for compensation was therefore properly entertained and determined by the Lord Ordinary.

As to the third point—that on the merits—the question whether the appellant had suffered injury by accident arising out of and in the course of his employment was purely one of fact. I have considered the points submitted to us by the Lord Advocate on the part of the respondents, and have come to the conclusion in common with the Lord Justice-Clerk and Lord Anderson that there was evidence on which the Lord Ordinary might properly find in favour of the appellant.

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(1) [1908] 2 K. B. 551.

As to the expenses I agree with their Lordships of the Second Division, and in this respect the interlocutor of the Lord Ordinary must in my opinion be varied. On this point I agree that justice will be done by giving no costs to either side in the proceedings before the Lord Ordinary or in the Second Division.

The result is that in my opinion the interlocutor of the Second Division must be discharged and that of the Lord Ordinary restored except as to the expenses. The appellant should have the usual costs in this House allowed in a pauper case.

LORD THANKERTON. My Lords, the facts of this case and the procedure in the Courts below have been sufficiently related by your Lordships. Consideration of the four questions raised in the case involves the construction of s. 29 of the Workmen's Compensation Act, 1925, and in particular of its second sub-section.

Sub-s. 1 of s. 29 puts the workman to his election between proceedings under the Act and proceedings independently of the Act. The present appellant elected to take proceedings independently of the Act, in which he failed on the adverse verdict of a jury.

In that situation the appellant was enabled by sub-s. 2 to have recourse to a claim for compensation under the Act, provided that he complied with the conditions of the sub-section. In the first place, it is clear that the provisions of sub-s. 2 of s. 29 provide a special code, and that the case does not fall to be dealt with under the statutory arbitration code of ss. 21 to 28 until the certificate of compensation is given, which has the force and effect of an award under the Act. In the second place, it is clear that where, as here, the merits of the independent proceedings are determined by a jury, the questions of liability under the Act and of compensation under the Act are to be determined by the Court and not by the jury.

In my opinion there is only one process throughout, and both the determination of liability under the Act and the assessment of compensation are to be dealt with in the process of the independent proceedings, and the process must be kept in being for this purpose by application made before the independent action is disposed of by application of the verdict of the jury or by decree of absolvitor or dismissal. This latter point is well established by authority. The word "dismissal" in the sub-section is not used in the technical Scottish sense.

It follows, in my opinion, that the right of appeal according to the form appropriate in such a process will be open as regards both the question of liability under the Act and the assessment of compensation, but that the grounds of appeal will be limited in the same way as if the Court, against whose decision the appeal is taken, had been sitting in a statutory arbitration under the Act. The decision will be final as to fact and open to review only as to law. Accordingly I am of opinion that the reclaiming note was competent in the present case, and that the appellant fails in his first contention.

The second point relates to the condition with which the sub-section opens—namely: "If, within the time hereinbefore limited for taking proceedings under this Act, an action is brought to recover damages independently of this Act." One is thereby referred back to the provisions of s. 14, sub-s. 1, which are as follows: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death." There follow several provisoes which are not material in the view which I have formed. This section does not limit the time within which the proceedings under the Act are to be brought, but it lays down two conditions precedent to such proceedings in regard to notice of the accident as soon as practicable and a claim for compensation within six months. In the present case the appellant was absolved from the first condition by s. 35, sub-s. 1 (*a*), and would have been entitled to apply for arbitration on his claim as and when he chose; if the respondents wished to expedite the arbitration it would be open to them to do so by an application to the arbiter for its disposal. They would also thereby be able to force the workman to make his election under sub-s. 1 of s. 29. In fact the appellant raised the present action on a date a little more than six months after the accident, and I am of opinion that, the conditions precedent of s. 14, sub-s. 1, having been satisfied, the appellant brought the present action "within the time hereinbefore limited for taking proceedings under this Act."

I have had the opportunity of considering the opinion of my noble and learned friend Lord Dunedin, and I desire to express my full concurrence in the views he has expressed as to the proper procedure in these cases under s. 29, and also in his observations on the cases of *Slavin* v. *Train & Taylor* (1) and *Cribb* v. *Kynoch, Ld.* (*No.* 2). (2)

On the question as to liability under the Act, I agree with your Lordships that there is no ground for interfering with the decision of the Lord Ordinary, and I also agree with the course proposed as to expenses in the Courts below and in the present appeal.

Interlocutor of the Second Division of the Court of Session in Scotland reversed. Cause remitted back to the Court of Session with a direction of new to repel the objections to the competency of the reclaiming note; recall the

(1) 1912 S. C. 754.

(2) [1908] 2 K. B. 551.

interlocutor of the Lord Ordinary, assoilzie the defenders from the conclusions of the summons, and further to find that the typhoid fever contracted by the pursuer was an injury by accident arising out of and in the ordinary course of his employment with the defenders, and to award him compensation at the rate determined by the Lord Ordinary, and to find neither party entitled to expenses and to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the appeal to this House, such costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, July 1, 1930.

Agents for the appellant: *Lawrence Jones & Co.*

Agents for the respondents: *Botterell & Roche, for Maclay, Murray & Spens, Writer, Glasgow; and J. & J. Ross, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1930
June 30.

W. R. PATTON . . . . APPELLANT;

AND

TORONTO GENERAL TRUSTS CORPORATION AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Will—Construction—Annuity conditional upon Religion—Infant Annuitant—Change of Religion upon Majority.

A testator, who died in 1919, bequeathed to his grandson, the appellant, an annuity, provided that he was and proved himself to be of the Lutheran religion; until he was twenty-five years of age the annuity was to be paid to his mother for his benefit. In 1917, when the will was made, the appellant was only twelve years of age, and the testator knew that the appellant's mother was a Roman Catholic, and that he was being brought up in that religion. According to the law of Germany, where the appellant and his parents were domiciled, the appellant could not effectively change his religion without their consent until he was twenty-one years of age. On reaching that age he proved that he had become of the Lutheran religion, and he had since remained so:—

Held, that the intention of the testator was that the appellant should have an opportunity of choosing his religion, and that as he was entitled in law to postpone his choice until he was twenty-one (but not beyond) he was entitled to receive the annuity, also arrears from the date of the testator's death, as until he reached twenty-one his enjoyment of the annuity was free from condition.

In re May [1917] 2 Ch. 126 applied.

Judgment of the Supreme Court of Ontario 63 Ont. L. R. 655 reversed.

APPEAL (No. 127 of 1929) from a judgment of the Supreme Court of Ontario, Appellate Division (April 5, 1929), affirming a judgment of Middleton J.A. (November 7, 1928) upon an originating summons.

The questions arising were whether upon the true construction of the will of William Robert Patton, who died on February 26, 1919, his grandson of the same name (the appellant) was entitled to an annuity thereby bequeathed to him, and a further annuity thereby bequeathed to his father R. G. Patton, with reversion to him upon the death of his father, which occurred on July 4, 1928.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD DARLING, LORD ATKIN, and LORD MACMILLAN.

The terms of the will and the material facts appear from the judgment of the Judicial Committee.

The trial judge (Middleton J.A.) held that the appellant was not entitled to either annuity. Upon appeal to the Appellate Division the learned judges were equally divided in opinion, and the appeal was therefore dismissed. Latchford C.J. and Orde J.A. agreed with the view of the trial judge. Fisher J.A., with whose judgment Riddell J.A. concurred, was of opinion that the appellant was entitled to both annuities. The judgments in both Courts appear in a report at 63 Ont. L. R. 655.

1930. April 29. *J. H. Fraser K.C.* for the appellant.

J. W. F. Beaumont K.C. and *Donald Macdonald* for the respondents.

June 30. The judgment of their Lordships was delivered by

LORD BLANESBURGH. The issue raised by this appeal is concerned with gifts of two annuities, one immediate and the other reversionary, made to the appellant by the will of his grandfather, William Robert Patton, formerly of the City of Toronto. The Courts of Ontario have held—the Appellate Division, however, being equally divided on the question—that the appellant has lost both annuities by reason of his failure to comply with what the learned judges have considered to be a condition precedent to the enjoyment of either—namely, that at the date of the testator's will, or alternatively, at the date of his death, the appellant should, amongst other things, have been and should have proved himself to be, of the Lutheran religion. Hence this appeal by him.

By his will the testator appointed the Toronto General Trusts Corporation, his nephew Thomas W. Carlyle, and his niece and adopted daughter, the respondent, Annie Louise Carlyle, to be his executors and trustees; and after certain specific bequests, including one by which he is expressed to "give, *devise* and bequeath" his gold watch and chain and pendant locket to the appellant, he directed the residue of his estate to be sold and invested. Thereupon follow the provisions with reference to the application of the income of the invested fund upon which the questions at issue immediately depend.

These are as follows: "(*c*) Provided my son Robert George Patton, now residing at Cologne, Germany, is and remains up to the date of his death a British subject, and is and proves himself to be of the Lutheran religion, to pay to my said son, Robert George Patton, annually for and during the term of his natural life the sum of $1500 in quarterly payments; and provided and so long as my grandson, William Robert Patton, the son of my said son Robert George Patton, is and remains until the date of his death a British subject, and is and proves himself to be until the date of his death of the Lutheran religion, to pay to my said grandson, William Robert Patton, for and during the term of his natural life the sum of $500 a year, payable quarterly, it being my wish and intention that until my said grandson attains the age of 25 years said annuity is to be paid to his mother, to be controlled by her for the benefit and interest of my said grandson until his twenty-fifth year, and on attaining the said age of 25 years I direct that said annuity shall be paid to my grandson direct. In case of the decease of the mother of the said William Robert Patton before the said William Robert Patton attains the age of 25 years, I direct that said payments so to be made for the benefit of my said grandson shall be paid by my trustees above mentioned for his maintenance, education, care and advancement in life.

(*d*) On the decease of my said son, Robert George Patton, the above-mentioned annuity so to be paid to him, provided the conditions on which said annuity is given have been fulfilled, shall be then paid to my said grandson, William Robert Patton, for and during the term of his natural life, on the condition, as above mentioned, that he is and remains a British subject, and is and proves himself to be of the Lutheran religion."

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The following further provisions of the will may be referred to as indicating the general nature of the document and as assisting the construction of the clauses above set forth: "(*e*) On the decease of my said grandson, William Robert Patton, he having remained a British subject up to the time of his death and having proved himself to be and remaining of the Lutheran religion up to the time of his death, I direct that the money so set apart for the payment of said annuity to his father and himself shall be paid and distributed by my trustees among such of the lawful issue (child or children) of my said grandson as he shall by his last will and testament appoint or direct.

(*f*) In the event of either my said son or grandson not having remained until the date of their death British subjects and of the Lutheran religion, I direct that the bequests herein made for their benefit shall absolutely cease and be of no effect, and that the said money above mentioned so set apart for their use and benefit shall revert and become part of the residue of my estate."

The testator then directs (*g*) that the residue of the income of his estate is to be paid to the respondent; (*h*) that on her decease, leaving issue, her surviving, the whole estate is to be paid to such persons as she may by deed or will appoint; (*i*) that on her decease prior to the death of his son and grandson without leaving issue, her surviving, the annual income of his son and grandson is, "provided they have complied with the conditions above mentioned," to be increased by $250 a year to each of them; and (*p*) that if his said grandson, "having conformed to the conditions above mentioned," dies without leaving lawful issue him surviving, then on the decease of his son and grandson "that portion of my estate from which the annual income payable to my son and grandson is derived shall revert to and become part of the residue of my estate." And there is, finally, a comprehensive clause forfeiting the interest thereunder of any beneficiary who "enters into litigation for the purpose of voiding questioning altering or setting aside" the will or any of its provisions.

It is very manifest, even from this partial recital, that their Lordships are here confronted with a will which has to submit to construction at almost every turn if the manifest intention of the testator is not in the event to be frustrated. A "devise" of a watch merely indicates on the part of the draftsman a forgetfulness of elementary principle, but it is a more serious reflection on his accuracy that on the words of clause (*e*), that while the son, to obtain and retain his annuity, must be and remain a British subject, he is not required to do more than prove that he is of the Lutheran religion without, like the grandson, being under the obligation to remain of that faith. Nevertheless, under clause (*f*), literally construed, his annuity ceases if, while himself remaining both British and Lutheran, his son has ceased to be either one or the other.

It will be observed, too, that unless construction can be invoked to assist the poverty of language the draftsman has produced for the testator, contrary to his plain intention, an intestacy, if, in the event stated in para. (*e*), the grandson makes no testamentary appointment, or, in that stated in para. (*h*), the respondent makes no appointment either by deed or will. Indeed, the will throughout, while presenting superficially a show of technical knowledge and skill, is so inartificially drawn that it furnishes a good example of a case in which an examination of the circumstances in which the testator made it, and the facts with reference to the appellant known to him at the time, may have a decisive influence on the true construction of provisions with reference to the appellant which are themselves of uncertain or ambiguous import.

The will was made on December 22, 1917—that is to say in the middle of the war—it was made by the testator in Ontario, where he was domiciled. He died in England on February 26, 1919. He was a widower with one son, Robert George Patton, father of the appellant, then, as stated in the will, resident in Germany.

In his earlier life the testator had himself lived in Germany. His wife had been German. His son, a physician by profession' had remained in Germany after the testator left for or returned to Canada. He in turn had also married a German lady, and she was a Roman Catholic. The appellant is the only child of that marriage. He was born on January 5, 1906. Accordingly, when the testator made his will he was barely twelve years old. At that time, presumably in obedience to an arrangement made prior to the marriage of his parents, he was being brought up a Roman Catholic—that is to say in the religion of his mother. His father, in an affidavit put in evidence by the executors, said that all this was taking place, as he verily believed, to the knowledge of the testator, and in a letter to the executors on September 26, 1919, shortly after the testator's death, he stated that he had explained to his father the reason why he had to educate his son in the Catholic faith, and the testator, he adds, agreed to it. He concludes with a reference to some letters he had addressed to the respondent, Miss Carlyle, the testator's niece and adopted daughter, and also, as above stated, an executor of the will.

There was some difference of judicial opinion in the Appellate Division upon the question whether the testator when he made his will did or did not know that the appellant was being brought up as a Roman Catholic. This issue of fact bulked very largely in the arguments before the Board. Middleton J. in the Court of first instance apparently attached no importance to the matter, and makes no reference to it. In the Appellate Division the learned Chief Justice is in complete agreement with Middleton J. Orde J., however, while agreeing in the result with the Chief Justice, observes in passing that there is no evidence that the testator did know the appellant's then situation in this respect. Fisher J.A., on the other hand, and with him Riddell J.A. agrees, states that according to the uncontradicted evidence the testator when he was making his will knew the circumstances under which the appellant was, under his mother's direction, being brought up in the religion of the Roman Catholic church.

Now, in this matter, their Lordships can have no doubt that this fact must in these proceedings be taken to be as stated by Fisher J.A. All the evidence before the Court was put in by the applicants, the executors. Uncontradicted or unqualified, that evidence led only to one conclusion on this point. The respondent, Miss Carlyle, residing with the testator, to whom Robert George Patton addressed his letters, herself one of the applicant executors, and, as so expressed, a respondent to the application as well, must presumably have been in a position to contradict or at least to qualify that evidence had contradiction or qualification been truthfully possible. She remained silent. Robert George Patton being dead, no further evidence from him was by the date of the hearing obtainable, and no further evidence was called for by the respondent. It is on this footing that the Board proceeds to an examination of the provisions of the will.

Before entering upon that task it is necessary only further to state that Robert George Patton died on January 28, 1928, having been in receipt of his annuity up to the date of his death; that the appellant who, from his birth, has been a British subject, attained his majority on January 5, 1927; and that within a few days of that event—namely, on January 30, 1927—he became, and has since remained, a member of the Lutheran religion or faith. It is also in evidence that according to German law, to which presumably both the appellant and his parents, domiciled in Germany, were in this matter subject, the appellant, before he attained majority, was not, without the consent of both his parents, in a position effectively to change the religion in which he was, during minority, being brought up at their instance. It is in these circumstances that the question has now to be determined whether the appellant is entitled to both of his annuities or to one of them only, or whether, as has been so far held, he is entitled to neither the one nor the other.

The claim of the appellant to his immediate annuity will be first dealt with. It has in the judgment of the Board been made out.

Imputing to the testator, as their Lordships do, knowledge that at the date of his will the appellant, a boy of eleven, was being educated by his mother as a Roman Catholic, the construction placed upon clause (*c*) of the will in the judgments appealed from involves that its elaborate provisions, so far as the appellant was concerned, were to the knowledge of the testator struck with sterility so soon as they were written. They were completely ineffective. It is impossible that having such a result they express the testator's real intention. Learned counsel for the respondent did not conceal from the Board his view that if knowledge of the appellant's religious position was to be imputed to the testator when framing his will, the construction placed upon the clause by the Courts in Canada was beset with difficulties. Indeed, these difficulties are so formidable that it becomes obligatory upon a Court of construction to ascertain whether, construed in association with the surrounding circumstances known to the testator, the words used are not capable of a more rational interpretation.

Now, speaking of his only grandson, not yet twelve years of age, and known to him to be then under Roman Catholic discipline, the testator in terms requires the boy then to be, and to prove himself to be, until the date of his death, of the Lutheran religion. If its strict literal construction is its true construction, the testator here imposes upon the appellant a condition impossible of performance. But the testator has definitely given him the opportunity of proving that he is of the Lutheran religion, and that opportunity, if it is to be his at all, must be operative at some date later than that which is in literal terms prescribed. Moreover, if the proof to be adduced is to be such as can be accepted, it must, the appellant being an infant, be given when he is not only able to prove that he is of the Lutheran religion, but when, his years of disability being over, he can no longer, by parental authority or otherwise, be constrained to submit to the discipline of any other Church. In other words, as their Lordships think, the testator meant that the appellant was to have a real choice in the matter, and just as, in the eye of the Court, the appellant was not in a position truly to determine what his religion was until he had attained his majority (*In re May* (1)), so the testator here has not imposed upon him any

(1) [1917] 2 Ch. 126.

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earlier limit of time. That such was the meaning of his requirement is at the least consistent in their Lordships' view, with his direction that in the first instance the annuity is to be administered for the benefit of the appellant by his Roman Catholic mother and not by his Lutheran father, a provision which, while naturally making compliance with the condition conscientiously more difficult to the appellant when the time came for decision, would seem to indicate a readiness on the part of the testator to leave him in his mother's religion until his youth had passed away. The testator, it is true, ends the appellant's disability at twenty-five, and it may be that that age was in his mind. But the appellant was, of course, entitled, on well established principles of construction, to demand payment of the annuity to himself direct on attaining the age of twenty-one, and the result is in their Lordships' view that the appellant on attaining that age was bound to supply the proof required, as he has done. The will properly construed called for no more at his hand. Until he attained twenty-one his enjoyment of the annuity was free of condition, and in the result he is now entitled to receive all arrears of it as from the death of the testator, and to have it, subject to condition, paid to him for the future.

In this view of the will clause (*e*) confirms the position of the appellant, instead of weakening it, as was supposed by Orde J.A. For the will of the appellant therein referred to, exercising his power of appointment, would only be valid if executed after he had attained twenty-one. By that time, whether the will was made in the lifetime of his father or not, he was in a position to comply with all conditions imposed upon him by the testator.

Next as to the claim of the appellant to his reversionary annuity. Here, the learned judges unfavourable to him all admit that, prima facie, the test required with reference to that annuity need first be applied only when the right to it opened to the appellant, i.e., by the death of Robert George Patton, his father, by which date the appellant had in fact fulfilled the conditions both as to British citizenship and the Lutheran religion. But they argue that this prima facie view is displaced by the words "as above mentioned" which, according to them, drive back the condition to the date at which the appellant had to fulfil it so as to become entitled to his immediate annuity, and that date, in their view, was, at the latest, the day of the testator's death.

The answer to this is twofold. First, their Lordships, differing here from the learned judges, are of opinion, for the reasons already given, that the condition as to the appellant's immediate annuity did not fall to be fulfilled once for all at the testator's death; and, secondly, they think that the words of the present condition which follow the words "as above mentioned" are, and are intended to be, exegetical of them, so that it is the succeeding words, bearing the construction which is naturally to be attached to them, that alone define the condition which the appellant is here required to fulfil.

His claim to this reversionary annuity is accordingly also established.

In the result, and for these reasons, their Lordships are of opinion that this appeal should be allowed: that the judgment of the Appellate Division of the Supreme Court of Ontario, dated April 6, 1929, and the judgment of Middleton J., dated November 7, 1928, should both be discharged, and that it should be declared that the appellant as from the death of the testator is entitled to the annuity of $500 given him by his will: and that he is, as from January 28, 1928, entitled to the annuity of $1500, thereby also given to him on the death of his father: and that he is entitled to each of these annuities for his life or for so long as he remains a British subject and is and proves himself to be of the Lutheran religion.

Their Lordships will humbly advise His Majesty accordingly.

As to costs their Lordships note that it was only with some hesitation that Middleton J. directed the costs of all parties to be paid out of the estate. Their Lordships note also that if there had been a majority of the judges of the Appellate Division against the appellant, he would have been ordered not only to pay the costs of the appeal but would have had

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to pay the executors' costs as between solicitor and client. As to the costs in the Court of first instance, it appears to their Lordships that this was pre-eminently a case in which the difficulty being caused by the testator himself, and the question being raised by the executors in the most inexpensive form, an order for the costs of all parties to be paid out of the estate, and even as between solicitor and client, was, in any event, almost a matter of course. As for an order directing the appellant to pay any costs of the executors as between solicitor and client, their Lordships know of no principle upon which such an order could have been supported. As against an opposite party executors are no more entitled to solicitor and client costs than is an individual litigant.

Now, however, that this appeal has succeeded costs stand upon a different footing, the appellant being, of course, entitled to his costs throughout, it being right that in the Court of first instance these should be taxed as between solicitor and client. In relief of the respondent, who is interested in the residue only for her life, all the costs should come out of the corpus of the estate and not out of her interest only, and as her action has been in defence of the entire fund her costs to be borne thereout should be taxed as between solicitor and client. The proper order as to costs will, therefore, be, that the costs of all parties in the Courts below and of this appeal be paid by the executors out of the estate: the costs of all parties in the Court of first instance, and the costs of the executors and of the respondent throughout, being taxed as between solicitor and client.

Solicitors for appellant: *Lawrence Jones & Co.*

Solicitors for respondents: *Beachcroft, Hay & Ledward; Blake & Redden.*

[PRIVY COUNCIL.]

J. C.*
1930
July 8.

KEEWATIN POWER COMPANY, LIMITED . . . . APPELLANTS;

AND

LAKE OF THE WOODS MILLING COMPANY, LIMITED . . . . . RESPONDENTS.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Easement—Easement implied from Circumstances of Grant—Crown Grants—Water Power—Outflow from Lake—Artificial Channel to Mill.

In 1894 the Crown, by an Ontario patent, granted to the appellants the banks and bed of a natural outflow from a very large lake, and the adjoining water power. The grant provided that it was not to be construed as conferring exclusive rights elsewhere upon the lake or upon other streams, nor as authority to restrict any powers or privileges therebefore enjoyed by the Crown. The appellants used water power from the outflow to work an electrical power plant. In 1892 and 1891 the Crown had similarly granted to the respondents' predecessors in title land the boundaries of which, in each case, included a mill and an artificial channel from a bay of the lake. The mills had been erected and the channels made by the grantees with the approval of the Crown; the grants mentioned the mill races, but did not expressly include water power. The respondents used water power from the channels to work their mills. Water passing through the channels and the mill sluices, when open, flowed into the river formed by the outflow at a point below the appellants' works. The appellants brought actions to restrain the respondents from diverting water from the lake:—

Held, that having regard to the circumstances in which the grants of 1892 and 1891 were made they each conferred an easement upon the respective respondents to use water from the channel for the purpose of working a mill, and the grant to the appellants was subject to that easement. The easement was limited only by the capacity of the respective channels when granted, not by the size or character of the mill then existing thereon; although the water could be used only for working a mill, it could be used to develop electrical power to work or light a mill.

Pwllbach Colliery Co. v. *Woodman* [1915] A. C. 634, 646 applied.

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD DARLING, LORD ATKIN, and LORD MACMILLAN.

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1930
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LAKE OF THE WOODS MILLING CO.

CONSOLIDATED APPEAL (No. 29 of 1930) from two judgments of the Supreme Court of Ontario, Appellate Division (June 26, 1929), dismissing appeals by the plaintiffs, and allowing appeals by the defendants, from judgments of Grant J. (January 25, 1928).

The appellants owned the banks and bed of an outflow of the Lake of the Woods, a lake 1500 square miles in extent in the Province of Ontario. They held under a Crown patent (Ontario) of 1894 which expressly included the water power of the adjoining lands. The above named respondents owned a flour mill and surrounding land, including an artificial channel from a bay of the lake to their mill. They held under a Crown patent (Ontario) of 1892 to their predecessors in title. The respondents in the connected appeal owned a neighbouring mill and similar channel under a similar patent of 1891.

The facts, including the circumstances in which the grants of 1892 and 1891 were made, appear fully from the judgment of the Judicial Committee.

In 1916 the appellants, who had erected a dam in the outflow of the lake and proposed operating an electrical power plant by water power therefrom, brought two actions in the Supreme Court of Ontario, one against the respondents above named and the other against the respondents in the connected appeal, each for an injunction to restrain the defendants from diverting any water from the lake. Pleadings were delivered, but the actions were not proceeded with until 1927, when the appellants had erected their electrical power plant. In the course of the proceedings, and by their case in the present consolidated appeal, the appellants contended that if the respondents respectively had a right to divert water from the lake they had diverted water in excess of their rights.

The actions were tried together by Grant J., who held that having regard to the circumstances in which the grants to the defendants' predecessors in title had been made they were entitled to use for the purpose of operating their respective mills all the water which might pass through the channels according to their respective dimensions at the date of the grant to the plaintiffs. He made declarations to that effect, and ordered further that if the plaintiffs should so elect, it should be referred to the master to determine whether the dimensions of the channels had been increased, to what extent (if any) the defendants had diverted water in excess of their rights through the channels so increased, and the damages (if any) suffered by the plaintiffs.

The plaintiffs appealed, and the defendants cross-appealed against so much of the judgment as provided for a reference.

The Appellate Division, by a judgment delivered by Latchford C.J., dismissed the plaintiffs' appeals and allowed the defendants' appeals. The reasons of the Court were given on April 5, 1929, and appear from a report at 63 Ont. L. R. 667. The formal judgment of the Court was dated June 26, 1929. The plaintiffs had applied that the judgment in each case should declare the extent of the water which the defendants were entitled to divert. The Court stated that while the declaration made by Grant J. was in effect affirmed, it was not considered proper to insert it in the judgments.

1930. May 2, 5, 6, 12, 13. *Tilley K.C.* and *Horace Douglas* for the appellants. The appellants as owners of the banks and bed of the outflow are entitled to the natural flow of its stream undiminished by diversion of water from the lake. Under their patent they had an express grant of water power. The respondents had no such grant; the proviso in the appellants' grant conferred no rights upon the respondents. There was no Dominion or Provincial legislation which enabled the Crown to make a grant so as to impair the natural rights of lands still ungranted. [Reference was made to the Dominion Lands Act, 1883, the Public Lands Act, R. S. Ont. 1887, c. 24, and the Water Privileges Act, R. S. Ont. 1887, c. 119.] The grantees of the patents upon which the respondents rely were bound to keep the property in the state in which it was when they applied for the grants. In 1891, before the grants to the respondents, the Crown had contracted to sell to the appellants land including the outflow for the express purpose of a power plant which the appellants contracted to construct. The appellants therefore have an equitable title prior to the respondents' grants. An easement to use the channels for developing water power cannot be read into the respondents' patents, because a grant from the Crown must be construed strictly according to its terms: Chitty's Prerogatives of the Crown, pp. 391 to 394; Norton on Deeds, 2nd ed., p. 133. Even if the respondents had an easement to use the channels for water power it was limited by the capacity of the mills existing at the time of their patents. The evidence shows that the respondents' present mills are of much greater capacity, and that a larger amount of water passes through the sluices. The appellants were therefore entitled, in any case, to an injunction and an inquiry. [Reference was made to *Keewatin Power Co.* v. *Town of Kenora.* (1)]

W. A. Greene K.C. and *C. C. Robinson K.C.* (with them *G. P. Slade*) for the respondents. The appellants' claim to restrain the respondents from diverting any water from the lake involves a claim that after the grants to the respondents the Crown not only could have restrained them from using the mill races, but could have obliged them to maintain the sluices or equivalent obstructions to prevent the water of the lake flowing through the channels. As riparian owners upon the channels the respondents were entitled to the unrestricted flow of water in them. That is a natural right of property, not a limited easement: *Embrey* v. *Owen* (2); Gale on Easements, 6th ed., pp. 247, 248. The Crown, by sanctioning the making of the channels, was in the position of a riparian owner who divides the stream; the grants of land upon the channels therefore carried riparian rights in respect of them, as laid down in *Stockport Waterworks Co.* v. *Potter* (3) and affirmed in *Nuttall* v. *Bracewell.* (4) The channels

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(1) (1906) 13 Ont. L. R. 237; (1908) 16 Ont. L. R. 184.

(2) (1851) 6 Ex. 353, 369.

(3) (1864) 3 H. & C. 300.

(4) (1866) L. R. 2 Ex. 1.

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were of a permanent nature, being blasted out of the rock, and were made with the approval of the Crown. The authorities show that the respondents had the rights of riparian owners: *Sutcliffe* v. *Booth* (1); *Baily & Co.* v. *Clark, Son & Morland* (2), and other cases there cited. The respondents had equitable rights anterior to the equitable right claimed by the appellants. It is not shown that the Crown could not make a grant impairing its rights in ungranted lands. Further, this is a new point; if an Order in Council was necessary search might have discovered one. The contention that a right to use the channels cannot be implied in the Crown grants is answered by the Board's decision in *Lord* v. *Commissioners for the City of Sydney.* (3) Even if the respondents' rights in the channels are in the nature of easements merely, they are limited only by the capacity of the channels at the dates of grants. Though the mills were rebuilt, and the sluices improved, it was not shown that the channels have been enlarged. The appellants did not establish at the trial that the respondents were taking more water than the channels carried at the date of the grants to them; they were therefore not entitled to the inquiry ordered by the trial judge.

Tilley K.C. in reply. A right to use water running out of a lake by an artificial channel differs from that of a riparian owner in respect of a natural stream. In the latter case the riparian owner cannot get more than the natural flow; in the former he can increase the flow by enlarging the sluices. The respondents' rights in any case are limited to the amount of water flowing through the sluices at the date of the grants, and that depends upon the capacity of the mills then existing. [Reference was made to *John White & Sons* v. *J. & M. White.* (4)]

July 8. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. The Lake of the Woods is an enormous expanse of water 1500 square miles in extent. It

(1) (1863) 32 L. J. (Q. B.) 136.
(2) [1902] 1 Ch. 649, 668.
(3) (1859) 12 Moo. P. C. 473.
(4) [1906] A. C. 72, 79.

extends, however, over what is naturally a very flat country, so that the outflow from it is not very rapid. The level of the lake naturally varies according to the conditions of rainfall which have prevailed over this large area. The natural outlets to the lake are only two in number which are denominated the western and eastern outlets. The portion of land which divides the outlets is made into an island by the confluence of the outlets lower down, and this island is known as Tunnel Island. The outlets form a stream known as Winnipeg River which flows on towards the east; the level of the river is, roughly speaking, seventeen feet below the level of the lake, but the Winnipeg River has a backwater, fed by streams of no magnitude, which extends to the west of the entrance of the western outlet, roughly parallel to the shore of the lake above it. There is also a sort of arm of the lake called Portage Bay which goes westward parallel to the backwater, and is only separated from it by a narrow ridge of land. The neck of land which separates this arm of the lake from the backwater is very narrow, and the difference of level is practically the same as at the western outlet. As matters stand at present there are three outlets besides the two natural outlets. There is an old cut at the extreme west of Portage Bay, and there are two other water cuts or channels through the narrow ridge. The eastmost of these two cuts runs roughly fairly direct from the lake, passing under the Canadian Pacific railway which is bridged over it, northward to the backwater, and on it is situated the mill of the defendants and respondents the Keewatin Flour Mills Co. which has been denominated in these proceedings mill "C." The westmost of the two cuts, which is in close proximity to the other, begins by going northwards, but after passing under the railway turns westerly and then runs in a north-west direction till it reaches the backwater, and on it is situated the mill of the defendants and respondents, the Lake of the Woods Milling Co., which has been denominated mill "A."

The plaintiffs and appellants are the proprietors of Tunnel Island situate riparian to the western outlet. This part of the country was a debatable land between the Province of Ontario on the one hand, and the Dominion, who then represented what afterwards became the Province of Manitoba. In 1874 an agreement was come to between the Dominion and the Province that whatever rights were granted by either to private individuals should be ratified by whichever Government eventually was adjudged to own the land. In 1885 the litigation which had been set on foot to determine the dispute settled that the land in question was within Ontario but, as explained, the Government of Ontario was bound to ratify any grant that had been made by the Dominion. All the territory, including the numberless islands in the Lake of the Woods, was in those times thickly wooded. The main line of the Canadian Pacific railway crosses the two outlets and runs along the narrow neck aforesaid at a very short distance from the shore of Portage Bay.

In 1878 or 1879 the attention of a certain John Mather was attracted to this locality for the purposes of lumbering operations. He was the head of a company called the Keewatin Lumbering and Manufacturing Co. and he and his father cut a channel at the extreme west end of Portage Bay to the Winnipeg River and operated a mill thereon. Further in 1887 he was granted seven thousand dollars by the Government to erect, and he did erect, a roller dam, that is to say, a dam without openings, at the entrance to the western outlet to raise the level of the lake to make it more efficient for navigation and for any milling upon it. He subsequently became associated with each of the properties represented by the appellants and the respondents in these consolidated appeals, but for the moment mention must be made of a report which he made to the Dominion Minister on the potentialities of the district for developing water power. This report pointed out the particular suitability of three positions: (1.) the western outlet where the appellants' property is now situate; (2.) a natural depression through the narrow ridge. This is the position of the property of the respondents the Lake of the Woods Milling Co. and their mill "A," and (3.) a canal near Macaulay's Mill. This is the property of the respondents the Keewatin Flour Mills Co. and is mill "C." The materials of this report had really been provided by a survey by a certain McLatchie.

Now Macaulay's Mill mentioned as an existing thing had its origin in this way. Macaulay was a lumber man and he obtained as early as 1874 a grant of one hundred square miles, not defined but in the neighbourhood of the Lake of the Woods, to be selected by him, and he proceeded in 1878 to look out for a site for a mill where he could saw his timber. He selected the place where mill "C" now stands. At this time the Canadian Pacific railway was in construction and was just approaching this place. Macaulay, of course, saw that the railway, which was here on embankment, would block any channel from the lake to supply the mill, and he asked the Dominion authorities to let him have a bridge. In a letter written to Sir John Macdonald of 1878 he says that he has selected a site and goes on to say: "In order to make it available it will require an opening of forty feet wide left through the bank" (i.e., the railway bank) "at about section 134. What I now ask for is that a bridge of forty or fifty feet may be put across in order that my logs can run under, as my mill will be below the opening. If you will consent to this you will have one of the best water powers in the Country and will be a great benefit to me." His request was granted and a bridge was made so that the water cut he made could go under it. He duly carried the cut down to the backwater of the Winnipeg River. He built his sawmill which was finished by the autumn of 1881. The same autumn he entered into an agreement to sell his mill to Dick and Mary Banning. The price was to be paid by instalments and Macaulay became bound to get a regular title from the Crown. Accordingly, he got a regular patent from the Dominion Government in May, 1884, of the mill site with adjoining land including the water channel. The plan attached to the patent clearly shows the water channel traversing the middle of Macaulay's ground.

The further history of this property mill "C" now becomes involved with the history of the adjoining property, mill "A."

That history begins in 1887. By this time it was known that the territory belonged to Ontario. In that year Mather, who was vice-president and general manager of the Lake of the Woods Milling Co., which had by that time been formed, applied to the Government for a grant of land, stating that they wanted to establish a mill and use the water power of the Lake of the Woods. The piece of land applied for lay to the west of and contiguous to Dick and Banning's ground, and part of the grant which they applied for lay within Dick and Banning's boundaries. The Government, knowing that other people were about, answered their request thus: "23rd May, 1887.—Having reference to conversation had with you on Saturday last, the 21st inst., in connection with the application of the Lake of the Woods Milling Company for a site at Keewaydin, on which to erect a large flouring mill, &c., as per plan filed here by Mr. John Mather on March 23 last, I have to say that, I am very desirous of meeting the Company's wishes in all possible ways, but, as pointed out to you, there are some conflicting applications which will not allow me, without fuller information, to grant your application in full. I will say, however, that you are at liberty to go on and erect your mill on that part or portion of land marked on the plan filed by your Company as C.C.P., containing 1·56 acres, with the assurance that it will be sold to you on the understanding of course, that you will compensate the owners of any buildings or improvements found to be upon it, of the existence of which, however, there is at present no information here."

On the faith of that letter the channel was cut and the mill erected. The channel utilized a natural ravine which ran in a slanting direction. After this there was a great deal of correspondence, but eventually after an arbitration matters were fixed up with Dick and Banning and Dick and Banning granted a receipt for the money paid to them in October, 1890. Reverting now to Dick and Banning they obtained from the Ontario Government, who by this time were recognized as the real proprietors of the land, a patent. This patent described the land generally as a grant of 27 acres "known as the Dick Banning & Co.'s mill location between Portage Bay and Winnipeg Bay in the Municipality of Keewatin . . . . shown on plan of survey of said Municipality by E. Stewart, Provincial land surveyor, dated December 20, 1889. . . . ." The description by metes and bounds fixes the westerly boundary of the land granted 20 feet from the "mill race constructed by the Lake of the Woods Milling Co.," and Stewart's plan shows both that mill race and also the channel cut by Macaulay and since used by Dick and Banning. The date of the patent is January 5, 1891. In 1897, Mather, who was by this time vice-president and general manager of a company called the Ottawa Gold Mining & Milling Co., bought the mill and land from Dick and Banning. He pulled down the sawmill and built a reduction mill which he used for some time. Then, finally, Mather again, in his capacity as president and general manager of the respondents, the Keewatin Flour Mills Co., bought the property from the Ottawa Co. and erected a flour mill instead of the reduction mill which is working at the present time. In 1906, the respondents, the Lake of the Woods Co., acquired the control of this company.

Reverting once more to mill "A," the various parties having all been compensated, the Ontario Government granted, on August 10, 1892, a patent. This patent includes all the mill lands and mentions the mill race.

Turning now to the appellants' title. On November 24, 1891, the Keewatin Lumbering and Manufacturing Co., Mather, being then president and general manager, made an agreement with the Government for the purchase of Tunnel Island and some land on the other side of the western outlet with the water power adjoining. This agreement provided for the expenditure of certain moneys within specific times by the company in the development of water power and surrendered a lease of other lands held by the company. In September, 1893, the Lumbering Co. assigned its rights under the agreement to the appellant company, of which Mather was at that time vice-president and general manager, and on April 13, 1894, the Government granted the patent to the company of the land of Tunnel Island and the other lands mentioned in the agreement with the water power. At the same time, the appellant company erected a new dam called the Norman dam half a mile below the roller dam just on the crest of the rapids. As this was to raise the level of the lake and improve navigation the Government agreed to pay four thousand dollars towards its erection, but stipulated for the right to regulate the level of the water. But there was a provision that if the company should come to wish to use the dam for power purposes they might put an end to the agreement. No development of power, however, was effected until after the present actions were started in 1916. Mather died in 1906. In 1911 this new dam was found to leak and it was repaired not by the appellants but by the respondents, the Lake of the Woods Co., the expense being divided into thirds, one-third paid by themselves, one-third by the appellant company, and one-third by the Government; a proceeding clearly recognizing the joint interest of the three parties in the waters of the lake.

In 1913, one Backus made an agreement to take over the company's property. In consequence of this agreement, and at his instance, the present actions were started in 1916, but defences being put in, nothing more was done and they were allowed to drop. In 1920, Backus obtained all the shares of the company and began to develop power under a scheme. The actions were then revived and came to trial in 1927.

The appellants' case, as laid, was quite simple. In virtue of the patent from the Crown, the company is riparian owner on the western outlet. As such they say that they are entitled to the whole water naturally coming from the lake and they ask for an injunction against the defendants from diverting any water by means of their artificial cuts. This is at first sight a somewhat startling demand considering that the defendants have been working continuously since the dates above quoted.

The defendants reply that they have a right to do so by virtue of their patents which are prior in date to the patents of the plaintiffs. That contention has been upheld by the trial judge and unanimously by the Appellate Division. The argument of the appellants which logically comes first is so extravagant as to be scarcely worth repeating, but as it is tabled their Lordships will deal with it. It was that although the Crown at the time the earlier grants were made was proprietor of all the lands contained in the later grant, it could not grant any right which would interfere with the total rights of ungranted land. If that were so, it would be impossible for any proprietor to grant, e.g., a right to minerals, because if he afterwards granted a right to the land, then as rights to land extend a coelo usque ad centrum, the grant of minerals would be bad. The grant of an easement would be equally bad, and the whole doctrine of the prescription of easements would fall, because prescription is based on the assumption of a lost grant. No more need be said as to this untenable proposition.

The next question which arises is as to priority, and here there is a real question to be decided. As regards mill " C " there is no question, for the priority is undoubted. But as to mill " A " the case stands thus. The predecessors in title of the appellants had an agreement, as mentioned above, with the Crown to purchase Tunnel Island with the water power adjoining. This agreement was dated after the patent to mill " C," but before the patent to mill " A." Accordingly, the appellants argue that the agreement gave them an equitable right, and that although they did not get the patent till a date posterior to the patent for mill " A," yet, in virtue of the equitable right, their right must date back to the agreement, and consequently be anterior to that of the respondents, who own mill " A." In their Lordships' opinion, there are two answers to this contention.

The first answer is that these respondents also had an equitable right prior in date to the agreement of the appellants. After the long correspondence which took place as to the question with Dick and Banning, and after that dispute had been settled by arbitration, the Crown finally wrote, on December 19, 1890, to say that if the company would pay various parties the outlays they had incurred, and would agree to pay ten dollars an acre for the land, they were agreeable to grant the land, including the mill site, all as shown on a plan by P. L. S. Stewart. To that letter the company sent a reply on June 20, 1891, in which they say that Stewart's plan contained a little more than the plan in their original application, but that they were willing that the patents should be made out according to Stewart's plan, and that they would pay ten dollars per acre for any additional land that was needed. This, their Lordships consider, was a complete acceptance of the offer. It was not affected by the fact that the exact amount to be paid for the extra land had still to be calculated. If, then, two parties having both equitable rights, the party who has the prior equitable right obtains the first legal grant, there is no more to be said.

The other reason is that which weighed with the Appellate Division. In gremio of the appellants' title is the following condition: "Subject to the condition and understanding that nothing herein contained shall be construed as conferring upon the grantees exclusive rights elsewhere upon the said Lake of the Woods or upon other streams flowing into or out of said lake, or shall confer upon said company power or authority to interfere with, or restrict any powers or privileges heretofore enjoyed by us or which may hereafter be granted or demised to any other person or company in respect of any other water power on the said Lake of the Woods or any other stream flowing out of or into the said lake."

Their Lordships are of opinion that one of the powers and privileges "hitherto enjoyed by us" was the power exercised, and the privilege thereby made good of putting the existing cuts through the narrow neck of land; that is to say, the cut of the old mill at the west of Portage Bay and the cuts leading to mills "C" and "A." They also entirely endorse the pronouncement of the Appellate Division where in reference to this condition they say: "The 'understanding' must have been arrived at by minds representing the grantee as well as the Province of Ontario. Many of the shares in the plaintiff company were then owned by John Mather, and it is in the highest degree improbable that he and his associates should be parties to an understanding that would imperil their other long-established enterprises at Portage Bay." This settles the question as to priority of right. The next question is what are the rights of the defendants ?

The first argument addressed by the plaintiffs is that, as there is no actual mention of water rights in the patents the defendants have no right to the use of the water. This argument was fully dealt with in the Courts below, and their Lordships agree with the view of the trial judge and of the Appellate Division. It is clear beyond all question that the making of cuts, though actually done by the respondents' predecessors, was done with the full knowledge and approbation of the Crown, who at that time was proprietor of the whole lands belonging now to the plaintiff as well as of those of the defendants. The water cuts are shown in the plans annexed to the titles of both of the defendants to the full extent as regards mill "C," and to the extent where the mill stands as regards mill "A." The point may be tested by asking whether, in view of what it had permitted to be done, and indeed encouraged to be done, the Crown immediately after granting the patents, could have stopped up the outlets from Portage Bay. It clearly could not have done so, and the appellants can have no higher title than the Crown their author had.

The next argument is of the extravagant order but requires a little preliminary explanation. Neither of the cuts in question permits the water to run continuously from Portage Bay to Winnipeg River. In other words, there is no by-pass at the mills. The cut is absolutely blocked by the mill sluices and the water only flows when the sluices are opened. The reason for this is abundantly apparent. When a mill is placed on an ordinary river, though a dam may be made so as to impound a certain amount of water, yet as the river is continuously flowing the water must get past, and as it is not expedient to work the mill wheel continuously without stopping, there is a by-pass of some sort to allow the water to go down. But in this case there is really no current in the proper sense. The water is drawn from a huge lake and the amount of water available is determined by the level of the lake which varies. It would be utterly foolish for a mill in the position of mills " C " and " A " to erect a by-pass —always assuming that they had the right to do so—for it would simply lessen the supply from which they had to draw when they wished to work. But the arrangement being as stated the appellants argued that the only right in the defendants owing to what the Government had allowed them to do in the matter of the cuts, was to conduct the water to the mill by means of the cuts, but they had no right to let away the water by opening the mill sluices. Such a mill would, indeed, be appropriate for Tantalus, but such a mill and such a water power are unknown in modern jurisprudence.

There remains, however, another real and debatable question. What is the extent of the respondents' right ? Now the learned counsel for the respondents took very high ground. He said that what was done by the cutting of the mill races was equivalent to the division of the stream effected by the owner of the land, to wit the Crown. His clients were thus given a riparian situation on the stream so divided, and as such had all riparian rights. In other words they might use water as they liked provided they returned it, except in so far as consumed in drinking, to the stream, and they might, if they chose, let the mill races run by a by-pass. He relied on what was said by a majority of the Court in *Stockport Waterworks Co.* v. *Potter* (1) and affirmed in *Nuttall* v. *Bracewell* (2) : " The case where a riparian proprietor makes two streams instead of one, and grants land on the new stream, seems to us analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights."

(1) 3 H. & C. 300, 327. (2) L. R. 2 Ex. 1, 14.

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Their Lordships recognize this principle of law as absolutely correct in the case where the owner of both banks, as here the Crown, divides the stream, but the answer to this argument is one of fact: the Crown did not do it. They might have done it, and it is not devoid of interest to note that if they had gone on with the proposals indicated in the old report of Mather already mentioned, they would have done it, for that report, speaking of the proposed channel which ultimately came into being as Macaulay's cut, i.e., mill "C," indicated that it ought to be of somewhat large dimensions in order to provide for water power along the banks of the backwater of the Winnipeg River before it joined the outcome of the western outlet of the lake. But the Crown did not embark on any such scheme, but only allowed the individual mill proprietors to make cuts first for mill "C" and then for mill "A." The result in law is that the rights in the various proprietors are not the rights of riparian owners in the stream, but are rights of easement granted by and good against the Crown and also good against the appellants, who only take through the Crown, but still rights of easement. There are many easements which depend, as Lord Parker said in *Pwllbach Colliery Co.* v. *Woodman* (1), not upon the terms of the grant but upon the circumstances under which the grant was made. Now comes the question, what is the extent of the easement?

One word must here be said as to the pleadings. If the appellants' case was to be judged strictly on the pleadings there would be no room for the consideration of this question, for the only claim the appellants made when they came into Court was that the respondents were not entitled to take any water at all from the lake, and the respondents' answer was simply that they had not done anything that they were not entitled to do. But as the case went on it seems to have dawned on the appellants' advisers that it was possible to contend that though the respondents were entitled to some water they were not entitled to as much as they were taking, and they made such case as they could. The result was

(1) [1915] A. C. 634, 646.

that in his judgment the trial judge inserted the following declaration: "This Court doth declare that the defendants are entitled to use in the operation of their mill and plant at Keewatin all the water that may pass through the artificial channel in question herein, as the dimensions of the said channel existed on the 13th day of April, 1894, and doth order and adjudge the same accordingly." When the case came to the Appellate Division, the learned judge who gave the judgment of the Court, stated as one of the questions argued before them: "That if the defendants have rights to divert water, such rights are limited, and are not as declared in the judgment"; and in the judgment he said that their judgment practically affirmed the declaration aforesaid, though they did not think it necessary to embody it in the formal judgment.

In these circumstances, their Lordships would not wish to tie themselves down strictly by the pleadings and avoid giving their judgment on this matter. They are of opinion that the declaration made, so far as it goes, is right, that is to say, that the amount of water which the defendants may use is only limited by the size of the channel cut through Portage Bay, which the defendants are not at liberty in any way to enlarge. They think that is the inevitable result from the way in which the Crown, which was absolute master of the situation, gave their permission. The Crown officers saw the channel as cut, and made no objection; but they made no stipulation whatever and took, so far as is proved, no interest in the question of what were the dimensions of the mills as put up. After all, what is really the meaning of the granting of a water right for a mill? As Martin B. put it in *Nuttall* v. *Bracewell* (1), "the application and use of flowing water to work machinery is as old as the law." No doubt the machinery must be for the use of a mill, but the Crown made no stipulation as to the size of the mill, or as to its character. Here there have been sawmills, reduction mills and flour mills, all working in turn, and all without objection till the objection raised years afterwards by the present appellants. The real right given by the Crown was the right of bringing water to two channels. This is borne out by the expression used by the Crown in the limiting condition of the appellants' title already quoted: "The powers or privileges heretofore enjoyed by us or which may hereafter be granted or demised to any other person or company in respect of any *other water power* on the said Lake of the Woods." That shows that in the view of the Crown it had granted water powers and might do so again. The Crown were to their full knowledge granting water power and they laid down no restrictions as to amount, except the necessary restriction which ensued from the size of the channels cut through the ground.

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(1) L. R. 2 Ex. 1, 9.

The defendants had, their Lordships think, right to take for their mills all the water that the channels they had been permitted to make could bring them. Those channels they could not enlarge. It is also to be observed that the maxim "Tantum praescriptum quantum possessum" does not apply to an easement by grant. When you are dealing with grant, the grantee may always, if he chooses, not exercise his right under the grant to the full without in any way prejudicing his full right if he finds it convenient to use it. In truth, not only is the size of the channel the only limit as to the quantity of water that can be read out of the terms of the title and the circumstances attending the grant, the limit with which the Crown, which was master of the situation, was content, but there was no tangible case made as to the possibility of defining a limit of any other kind. As to mill "C," there are no data whatsoever. It would be perfectly impossible to evaluate the amount of water consumable by the sawmill taken down years ago. As to mill "A," certain figures have been put in dealing with the potentialities of the mill at different dates, but these figures could form no basis for a determination. Milling capacity in barrels has nothing to do with it, and the measurements as to the amount of water that can be passed in cubic feet per second are all based on a hypothesis of a 20-ft. head. But the head in actual working would necessarily vary. The truth is that this whole part of the case is a mere afterthought. There is no trace of any real damage being done to the water power of the plaintiffs, unless the taking of any water is a damage, but they conceived the idea of securing a monopoly to themselves of the whole of the water power of this enormous lake—an idea never entertained by the Crown, their author, when the whole arrangements were still to make. Nor is there any fear of the respondents damaging the lake, because by subsequent legislation, the Government has power to regulate the level of the lake.

There is, however, one other element of limitation as to which the judgments are silent. The easement is for a mill, and it is only for a mill that it can be used. The respondents could not, for instance, divert the water for a town supply or for the use of another tenement, or simply, by removing the obstruction, permit the water to run away. There is a suggestion of such misuse in the assertion that there has been an installation of hydro-electric power. Now if in order to turn some machinery in the mill it was better first to create electricity and let electricity do the work, that would be still use as for a mill. If it had been shown that the hydro-electric installation was being used for quite another class of business that would be struck at; but while the words sound big, the truth of the situation is that it is only used to light the mill, and their Lordships think that this also is clearly part of what would be permissible in connection with the mill. The mere fact that instead of having two installations at mills "A" and "C," they have one at mill "A" which supplies mill "C," is such a trifling matter that their Lordships do not think it calls for any interference.

Their Lordships have, in view of the importance of the case, gone into the whole matter from the beginning, but they have really done no more than concur in the very able judgment pronounced by the Appellate Division, and they will humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

BANK OF MONTREAL . . . . APPELLANTS;

AND

DOMINION GRESHAM GUARANTEE AND CASUALTY COMPANY, LIMITED . . . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Bankers—Negligence—Unauthorized Issue of Bank Drafts against valid Cheques—Fraud of Customer's Servant—Frequent Repetition of irregular Procedure—Estoppel—Ratification.

A company instructed its bankers in writing that any two of four named persons, of whom three were directors and the fourth was an accountant in the company's employment, had authority to draw cheques and sign orders for payments on its behalf. The company from time to time required bank drafts payable in New York to remit to creditors there. The course of business was that the accountant attended at the bank with a cheque, duly signed by two of the named persons, payable to the bankers' order for the sum for which the draft was required, but without any further document or written instructions; having filled up a requisition note giving particulars of the draft required, including the name of the payee, he was handed a draft in accordance with those particulars. In January, 1922, it was first discovered that on 41 out of 106 occasions upon which drafts had been so purchased since November, 1918, the accountant, having entered his own name in the requisition note, had obtained drafts payable to himself, and had misappropriated the proceeds, covering his fraud by false entries in the company's books. The respondents having paid the company under a policy guaranteeing the fidelity of the accountant, sued the bankers (the appellants) in respect of the loss after the date of the policy:—

Held, that the bankers had acted negligently in issuing the drafts without authority in accordance with the company's instructions, and were liable in damages in respect thereof; the frequent repetition of the same irregular procedure afforded no defence either by way of estoppel, ratification or otherwise.

Judgment of the Supreme Court of Canada [1929] S. C. R. 572 affirmed.

APPEAL (No. 1 of 1930) by special leave from a judgment of the Supreme Court of Canada (May 27, 1929) reversing a judgment of the Court of King's Bench for the Province of

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* *Present:* LORD SANKEY L.C., LORD BLANESBURGH, LORD DARLING, LORD TOMLIN, and LORD RUSSELL OF KILLOWEN.

Quebec (April 16, 1928) which affirmed a judgment of the Superior Court, District of Montreal.

The respondents insured to Willis Faber & Co. of Canada, Ld. (hereinafter called "the customers"), the fidelity of K. V. Rogers, the customers' chief accountant, and paid to them under the policy $7565 in respect of defalcations by Rogers between May 23, 1921, and January 10, 1922. The respondents, being subrogated to the rights of the customers, brought an action in the Superior Court, District of Montreal, against the appellant bank to recover the above sum as damages in respect of their negligence as the customers' bankers, whereby it was alleged that the loss had occurred.

The facts appear from the judgment of the Judicial Committee.

The trial judge (Duclos J.) dismissed the action for reasons which appear from the judgment here reported, and his judgment was affirmed on appeal to the Court of King's Bench for the Province of Quebec.

An appeal by the plaintiffs to the Supreme Court of Canada was allowed by Duff, Newcombe, Lamont and Smith JJ., Rinfret J. dissenting. The appeal is reported at [1929] S. C. R. 572.

1930. June 17, 19. *Sir Boyd Merriman K.C.* and *F. J. Tucker* for the appellants. The course of business adopted by the customers when they desired to purchase bank drafts from the appellants had been in operation for two and a-half years before the first of the defalcations in respect of which the present action was brought, and on numerous occasions the drafts had been made payable to Rogers' order. When a draft was required the customers telephoned first to the appellants to inquire the rate of exchange, and on each occasion Rogers attended with a cheque signed in accordance with the resolution for the necessary sum. No question as to the regularity of the procedure was raised at any time by the customers. In the above circumstances Rogers had ostensible authority to say in whose favour the required draft should be drawn. The resolution was treated by the customers as not applying to drafts issued on the instructions of Rogers against duly signed cheques. Owing to the previous transactions the appellants were under no duty to inquire from the customers whether Rogers had authority to say to whom the drafts should be payable. It is to be inferred from the evidence that if the appellants had so inquired the answer would have been that he had that authority.

J. A. Mann K.C. and *Frank Gahan* for the respondents were called on only with regard to one passage in the judgment of Duff J. [Reference was made to *Lloyds Bank* v. *Chartered Bank of India, Australia and China.* (1)]

July 17. The judgment of their Lordships was delivered by

LORD TOMLIN. This is an appeal from a judgment dated May 27, 1929, of the Supreme Court of Canada, whereby the Court by a majority reversed a judgment of the Court of King's Bench in appeal and directed judgment for $7565.61 and costs in all Courts to be entered in favour of the present respondents against the present appellants.

The action arises out of frauds committed by one K. V. Rogers while employed as chief accountant by Willis Faber & Co. of Canada, Ld., who will be hereafter referred to as the customers.

Rogers had entered the customers' service in 1907 and became their chief accountant in 1912. The fidelity of Rogers was insured by the customers with the respondents for one year from May 23, 1921. During that year frauds were committed by Rogers, and the customers recovered under their policy from the respondents $7565.61 in respect thereof.

Thereupon the respondents, being admittedly subrogated to the rights of the customers, began the action of which this appeal before their Lordships' Board is the final stage to recover from the appellants, who were the customers' bankers, the amount paid by the respondents to the customers under the policy on the ground that the frauds of Rogers were the outcome of the appellants' negligence.

The customers carried on business as insurance brokers. In the ordinary course of their business the customers had occasion from time to time, in order to discharge obligations to creditors in New York, to purchase from the appellants bank drafts on New York.

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(1) [1929] 1 K. B. 40.

On July 8, 1912, the board of directors of the customers passed a resolution in the following terms: "That any two of the following persons, namely, Mr. Raymond Willis, president, Mr. O. W. Dettmers, director, Mr. E. N. Mercer, director, and K. V. Rogers, accountant, be and they are hereby authorized to make, draw, sign, accept or endorse bills of exchange, promissory notes, cheques, orders for payment or other commercial paper on behalf of the company, and that Mr. Raymond Willis, president, and Mr. O. W. Dettmers, director, and Mr. E. N. Mercer, director, and either of them singly, be and they are hereby authorized to make all contracts and engagements other than the foregoing for and on behalf of the company."

This resolution upon being passed was communicated to the appellants, and remained operative throughout the period of the transactions to which the present appeal relates.

Between November, 1918, and January, 1922, a series of bank drafts on New York were purchased by the customers from the appellants.

The course of business when a bank draft was required to pay a creditor was as follows: The customers, usually through Rogers, first ascertained from the appellants on the telephone the current rate of exchange. Rogers then prepared a cheque payable to the appellants' order, but never to his own order, for a sum approximately corresponding in amount (after allowing for difference in exchange) to the sum for which the bank draft was required. The cheque so prepared was placed by Rogers before one of the directors, Mr. Dettmers or Mr. Mercer, for their signature, either with a statement in writing prepared in the office of the customers, purporting to show the amount due to the creditor, or with an oral explanation by Rogers of the purpose for which the cheque and corresponding draft were required. The cheque was then signed on behalf of the customers by two of the persons named in the resolution of July 8, 1912. In fact, Rogers was one of the signatories to almost all the cheques used in connection with the purchase of drafts.

When the cheque had been signed Rogers took it, without any other document or written instructions, to the appellants' bank. At the bank Rogers first handed in the cheque for certification, and having received it back certified, went to the draft department of the bank and filled in upon one of the appellants' forms a requisition note indicating : (1.) that a draft on New York was required ; (2.) the amount of the draft ; (3.) the name of the person in whose favour the draft was to be made out, and (4.) the name of the applicant for the draft. In every case Rogers inserted the name of the customers as applicants for the draft.

Having filled in the requisition note, the note and certified cheque were handed by Rogers to the appellants' clerk, whose duty it was to issue drafts, and the draft was thereupon handed out to Rogers, any slight difference due to the rate of exchange between the amount of the cheque and the amount actually required for the purchase of the draft being adjusted by Rogers by the payment or receipt of cash.

Between November, 1918, and January, 1922, 106 drafts were purchased in the manner which has been described. Of these purchases, 50 were made during the currency of the policy.

After January, 1922, it was for the first time discovered that Rogers had on 41 purchases out of the 106, by inserting in the requisition notes his own name as that of the person in whose favour the drafts were to be prepared, obtained from the appellants drafts in his own favour and had misappropriated to his own use the proceeds of the drafts, covering his defalcations by falsifying the customers' books.

Of the 41 misappropriations, 20 occurred before the policy was issued. The remaining 21 occurred during the currency of and were covered by the policy, and constitute the matters in respect of which the $7565.61 were recovered by the customers from the respondents.

The present action was begun on May 15, 1924, by the respondents against the appellants.

On May 5, 1927, Duclos J. dismissed the action with costs, on the ground (*a*) that the customers were estopped by their own negligence; (*b*) that they could not impose a greater standard of care upon the appellants than they exercised themselves; (*c*) that the customers held out Rogers as their agent and gave the appellants every reason to believe he was acting within their authority; (*d*) that the fact of Rogers asking for drafts to his own order was not sufficient to put the appellants on inquiry; and (*e*) that even if the appellants' suspicion might have been aroused on the first occasion such suspicion was allayed and lulled to sleep by the long series of similar transactions without objection or demur on the part of the customers and without notice to the appellants of any irregularity.

An appeal to the Court of King's Bench in appeal was dismissed on April 16, 1928.

The respondents appealed to the Supreme Court of Canada. On May 27, 1929, the Supreme Court by a majority allowed the appeal. The judgment of the majority was delivered by Duff J., and was concurred in by Newcombe, Lamont and Smith JJ. Rinfret J. dissented.

Their Lordships are of opinion that the majority of the judges of the Supreme Court of Canada arrived at a right conclusion in holding that the appellants were liable.

It is to be observed in limine that the customers being a limited company were capable of speaking and acting only through agents duly authorized in that behalf in accordance with their constitution, and that as between the appellants and the customers the duty of the former must prima facie be measured in the light of the resolution of July 8, 1912, which had been communicated to them.

In each of the instances under consideration the cheque drawn upon the appellants was duly signed in accordance with the resolution, and the appellants were justified in debiting the customers' account with the amount. But nothing was owing from the customers to the appellants in whose favour the cheque was drawn. The money, therefore, in the hands of the appellants remained the money of the

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customers. What was the duty of the appellants in dealing with it?

In their Lordships' judgment the appellants were not entitled to deal with it except upon a proper authority from the customers. If after certification each cheque had been retained by the appellants until the proper authority was forthcoming no question could have arisen. The appellants did not take this course. They were content to rest on the fact that Rogers produced a cheque duly signed. They returned the certified cheque to Rogers and accepted his sole direction as to how the money was to be applied. The requisition note was nothing but a direction by Rogers together with a representation by him as to the party on whose behalf he made it. If the requisition was made on behalf of the customers it did not answer the requirements of the resolution, the existence of which excluded the possibility of an inference that any officer of the customers had a general authority to direct the application of the customers' money. Rogers, in fact, had no authority, actual or ostensible, to select the person in whose favour the bankers' draft was to be prepared.

If the case had related to a single transaction the appellants could, in their Lordships' judgment, have had no defence. Does the matter stand otherwise because the customers' officers were negligent in their business methods or because a number of instances forming part of a series of similar transactions are involved?

As between the customers and the appellants the duty of the appellants was constitutionally prescribed by the resolution of July 8, 1912, and could only be altered by some direction of equal constitutional validity. No act or omission of the customers' officers lacking such constitutional validity, whether such acts or omissions were or were not negligent as between such officers and the customers, could relieve the appellants of any part of their obligations. The negligence relied on here was nothing more than a series of acts and omissions which might well have given the customers ground of complaint against their own officers, but did not justify any relaxation by the appellants of the vigilance which they owed to the customers.

Nor, in their Lordships' judgment, can the appellants find comfort in the fact that the transactions complained of were incidents in a series of similar transactions. In this connection the so-called doctrine of lulling to sleep has been invoked. Neglect of duty does not cease by repetition to be neglect of duty. If there be any doctrine of lulling to sleep it must depend upon and can only be another way of expressing estoppel or ratification.

It was admitted before their Lordships that estoppel had no place in this case.

Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies.

Here the ratification, if any, must have been ratification of authority in Rogers to direct the appellants how to deal with the proceeds of the cheques and in particular to specify at his discretion in what names the drafts were to be prepared.

As the customers and their directors were throughout in ignorance of what Rogers was from time to time doing and never intended him to have authority in any instance to select for insertion in the draft his own name or any name except a particular name, their Lordships are of opinion that in the circumstances of this case ratification cannot be made out.

In the result, therefore, none of the points upon which the appellants have relied can avail them, and in their Lordships' judgment the appeal fails and should be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Linklaters & Paines.*

Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.*
1930
July 24.

SAKARIYAWO OSHODI . . . . . APPELLANT;

AND

MORIAMO DAKOLO AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

Nigeria—Native Lands in Lagos—Expropriation—Rights in Compensation—Chief's reversionary Right in Holdings—Government Grant to Headman—Public Lands Acquisition Ordinance (Laws of Nigeria, 1923, *c.* 88).

The Government of Nigeria acquired under the Public Lands Acquisition Ordinance a compound in Lagos, which with other compounds was held by the appellant as paramount chief for the use of his family and household, members of which occupied houses in the compound and used the land in common. The occupants had heritable rights in their holdings subject to a reversion in the chief in the event of the family of an occupant becoming extinct. A Government grant had been made to a headman placed in charge of the compound:—

Held, that the occupants were entitled to the compensation awarded, but subject to the appellant receiving some small portion of it in respect of his reversionary right; the Government grant did not affect the respective rights of the chief and the occupants to the compensation.

Amodu Tijani v. *Secretary, Southern Nigeria* [1921] 2 A. C. 399 distinguished.

Judgment of the Supreme Court of Nigeria varied.

APPEAL (No. 31 of 1930) from a judgment of the Full Court of the Supreme Court of Nigeria (March 15, 1929) affirming a judgment of Tew J. (May 21, 1928).

The appeal related to the respective rights of the appellant and of the respondents collectively in the compensation to be awarded in respect of the acquisition of a compound at Epetedo, in Lagos, under the Public Lands Acquisition Ordinance (Laws of Nigeria, 1923, c. 88). The respondents were occupiers of houses in the compound and the appellant was their paramount chief. The question arose as a preliminary point upon summonses heard before the amount of the compensation had been agreed or ascertained.

The facts appear from the judgment of the Judicial Committee.

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* *Present:* VISCOUNT DUNEDIN, LORD TOMLIN, and LORD RUSSELL OF KILLOWEN.

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The appellant's claim to participate in the compensation was rejected by Tew J., and his judgment was affirmed upon appeal.

1930. July 11, 14. *Horace Douglas* and *A. L. Johnson* for the appellant.

R. F. Irving and *V. Holmes* for the respondents.

July 24. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. In May, 1927, the Governor of the Colony of Nigeria gave notice that he intended to acquire for public purposes a compound known as Alfa Iwo Court, situated at Epetedo, in Lagos. This he was empowered to do under the Public Lands Acquisition Ordinance. Following upon that, summonses were taken out to determine the persons to whom the compensation money, which was payable on the acquisition by the Government, should be paid. Alfa Iwo Court consists of a set of houses set round an internal court, which forms the access to them. The claimants are, on the one hand, Oshodi, who is the head of the family of Oshodi and who claimed it as paramount chief; and on the other the various occupants of the houses.

The general character of the title of natives to lands in Lagos was examined by the Board in the case of *Amodu Tijani* v. *Secretary, Southern Nigeria.* (1) What was laid down in that case was that the cession of the territory of Lagos by the King of Lagos to the British Crown in 1861 did not affect the character of the private native rights. That case had to do with community lands held under the white cap chiefs; but the general principle was held to apply to other lands not held by white cap chiefs in the subsequent case of *Sunmonu* v. *Disu Raphael* (2), where this was expressly stated. In general terms what the law comes to is this. The paramount chief is owner of the lands, but he is not owner in the sense in which owner is understood in this country. He has no fee simple, but only a usufructuary title. He may have some individual lands which he occupies himself, but as regards other lands they are occupied for his household, i.e., before the abolition of slavery for his slaves. These various occupiers have the right to remain and to transmit their holdings to their offspring, but in the event of the family of an occupier failing and being extinct, the chief has a right of reversion.

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(1) [1921] 2 A. C. 399.

(2) [1927] A. C. 881, 884.

In the lower Court each of the two parties, who for convenience sake were called plaintiff and defendants, the chief being plaintiff and the occupants as a body the defendants, claimed the whole of the compensation money. The lower Court decided in favour of the defendants and awarded to them the whole money. On appeal the chief modified his attitude. He no longer claimed the whole, but he said he was entitled to a share. This claim he based on two separate grounds. First, he said he was entitled to the money so far as it represented the value of the courtyard, because he alleged that the courtyard did not, so to speak, fall within the title of the various houses. Secondly, he said that he was entitled to something in virtue of his right to reversion.

The Supreme Court of Nigeria decided against him. From that judgment appeal has been taken to His Majesty in Council, and before this Board the plaintiff has maintained the same attitude as he did before the Supreme Court.

Now, the respondents first of all defend the judgment in their favour by alleging that the plaintiff has not proved his position as paramount chief in so far as this compound is concerned. That, however, was not the view of either of the Courts below. The history of the land in question was carefully inquired into by the trial judge. He came to the conclusion that one Oshodi Tappa, coming back out of exile, was put into possession in or about 1863 of twenty-one compounds, of which this is one, for him and his household. There has been considerable litigation as to others of the twenty-one compounds, and the trial judge sums up his conclusions thus: "I find that Chief Oshodi Tappa was the original 'owner' of the land, in the sense that he had the disposition and control of it, and such rights as he had have descended to the plaintiff." And the learned judges of the

Appellate Court in their unanimous judgment say: "The right of the Oshodi family to control the land at Epetedo, where Alfa Iwo Court is situate, has been always recognized by these Courts." They cited a variety of cases to that effect. Now, these are concurrent findings on what is really a question of fact, and though the conclusion as to fact may be based on inferences in law so as to prevent the rigid application of the rule as to concurrent findings, their Lordships will be slow indeed to disturb a finding which depends so much upon an appreciation of local circumstances and is arrived at by two Courts without any dissentient opinion.

One other matter here must be mentioned. A Government grant of the lands in question was passed in favour of one Okilu. Now Okilu was the headman placed in charge by the Oshodi family of this particular compound. It was the custom to put a headman in charge of each of the compounds, and when Government grants came to be issued the headmen were encouraged to get a Government grant. It has, however, been decided, and their Lordships have no intention of interfering with this decision, that grants given in such circumstances were really only grants in trust, and indeed left the property exactly as it was. This is a peculiar result. In truth Government grants are in their form inconsistent with the whole idea of native rights. They point to a transition state, but it is for legislation and not for the Board to bring to an end such a peculiar state of affairs as regards title. But the result in this case is not doubtful. It makes it impossible for the respondents either to improve their own position or detract from that of the plaintiff by pointing to the Government grant in favour of Okilu.

To turn now to the plaintiff's claim. Their Lordships have no hesitation in finding that his claim so far as put forward in respect of the court is unfounded. The court was never in the actual possession of the plaintiff. It was used in common by all the inhabitants of the houses and must be considered as being held along with the houses as an undivided share.

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But with regard to the right of reversion the matter seems otherwise. The learned judges of the Appellate Court seem to have clearly appreciated the situation. They say: "The Oshodi family would appear to have some contingent right, and if they can dispose of the property on the contingency arising, it must be presumed they can dispose of the land by letting it and charging rent." And then, after pointing out that the Oshodi family did not occupy and did not receive any rent, they go on as follows: "The family possess no rights which they can at present exercise—they possess the right which they might exercise on some contingent event in the future. There can be no doubt that by Government acquisition this possible contingent right has been taken away. Is compensation payable for the loss of this contingent right? We do not think, following the principles laid down in *Amodu Tijani's* case (1), that compensation is payable for possible future rights, that is to say, rights which are in embryo and may never fertilize." It is here that their Lordships are unable to agree. The possible contingent right is admitted, and the fact is found that by the taking of the land by the Government that contingent right is put for ever at an end. But the learned judges think that the principles laid down in *Amodu Tijani's* case (1) in this Court evaluate that contingent right at nil. Their Lordships can find no such pronouncement in that case. All that the case decided was that the compensation payable for lands held as community lands under white cap chiefs was not to be paid to the white cap chiefs as if they were giving them a fee simple right, but was to be given to them to be distributed among the usufructuary occupants whoever they were. It did not deal with rights of reversion. Their Lordships therefore are of opinion that some portion of the compensation money in this case should be allotted to the plaintiff in respect of his possible right of reversion, which is cut off for ever by the compulsory acquisition. He has not exercised any rights of eviction, if he had any such, in respect of any of the present occupants, and counsel for the

(1) [1921] 2 A. C. 399.

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plaintiff quite properly explained that he did not propose to ask anything in respect of such rights of eviction if they existed, as seems possible from the history of the various occupants given by the trial judge.

It is clear that the possible right of reversion on the failure of the family of any of the occupants, though not actually elusory, must be of small value. Their Lordships do not attempt by the settling of any fraction to evaluate it, because it will be much better done by the learned judge on the spot. Their Lordships think that the case must go back in order that the Court below may allot such portion of the compensation money to the chief as represents in their view the value of the possible rights of reversion.

As the success before their Lordships has been divided, their Lordships think there should be no costs awarded, but the respondents must repay the twenty-five guineas which were awarded to them as costs by the Supreme Court, if they have in fact been paid.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Oldfields.*
Solicitor for respondents: *E. F. Hunt.*

[PRIVY COUNCIL.]

J. C.*
1930
June 23.

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALTSPRINGS AND OTHERS . . APPELLANTS;

AND

CAMERON AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (*Nova Scotia*)—*United Church of Canada*—*Dominion Corporation*—*Provincial Act as to Property in Province*—*Inconsistency with Act of Incorporation*—14 *&* 15 *Geo.* 5, *c.* 100 (*Dom.*), *ss.* 4 (*c*), 10—*Stat. of N. S.*, 1925, *c.* 167, *s.* 8 (*a*).

By an Act to come into force on June 10, 1925, the Dominion legislature incorporated the United Church of Canada so as to give effect to an agreed basis of union between the Presbyterian, Methodist, and Congregational Churches throughout Canada. The congregations of the uniting Churches were to become congregations of the United Church, and their property was to vest therein. By s. 10, however, if any congregation voted at a meeting held within six months before June 10, 1925, not to enter the union it was not to be affected by the Act, and, by s. 4 (*c*), it was to be deemed not to have become a member of the United Church. The legislature of Nova Scotia had passed an Act, to come into force upon the United Church being incorporated, enacting that property of uniting congregations in the Province should vest in the United Church. Sect. 8 (*a*) provided that if a congregation, at a meeting held within six months after the incorporation, voted not to enter the union its property was not to be affected, but that if the congregation decided later to enter the union the Act was to apply to it and to its property.

A Presbyterian congregation in Nova Scotia voted at a meeting held within six months before June 10, 1925, not to concur in the union, but at a meeting held within six months after that date voted to enter the United Church:—

Held, that as by the Dominion Act which incorporated the United Church of Canada the effect of the earlier vote was that the congregation was not a constituent member of that body, it could not by virtue of Provincial legislation become a member, nor could its property vest upon the footing that it was so; further, that the later vote could not be treated as a decision to apply to the United Church for admission, with the effect that, if the application was acceded to, its property vested therein under s. 8 (*a*).

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* *Present:* VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD DARLING, LORD ATKIN, and LORD MACMILLAN.

The earlier vote, however, did not necessarily for ever debar the congregation from entering the United Church, as the Dominion Act recognized that a non-concurring congregation might become a member at a later time, though the Dominion legislature at present had not provided means whereby a later union could be effected.

Judgment of the Supreme Court of Canada [1929] S. C. R. 452 affirmed subject to a variation.

Appeal (No. 98 of 1929) by special leave from a judgment of the Supreme Court of Canada (February 5, 1929) affirming, with a variation, a judgment of the Supreme Court of Nova Scotia in banco (April 9, 1927), which reversed a judgment of Harris C.J.

The respondents, members of St. Luke's Presbyterian Congregation of Saltsprings, Nova Scotia, brought an action in the Supreme Court of Nova Scotia against the appellants, the trustees of that congregation, and others. The plaintiffs claimed that a meeting of the congregation on July 27, 1925, whereat the congregation purported to vote concurrence in union with the United Church of Canada, and all proceedings thereat, was void and of no effect; they prayed for an injunction restraining the defendants from using the property of the congregation on the footing that the congregation was connected with the United Church of Canada, and for other relief.

The facts material to the appeal, and the relevant provisions of the United Church of Canada Act (14 & 15 Geo. 5, c. 100, *Dom.*), by which that Church was incorporated, and of the United Church of Canada (Stat. of Nova Scotia, 1925, c. 167) in relation to property in that Province of congregations concerned appear from the judgment of the Judicial Committee.

The action was tried by Harris C.J., who held that the vote at the meeting of July 27, 1925, was effective to pass the congregation into the United Church of Canada, and to vest its property in that body. The Supreme Court in banco (Mellish J. dissenting) reversed the decision; the judgment, however, declared that the congregation might, at a meeting regularly held pursuant to the latter part of s. 8 (*a*) of the Provincial Act, enter the union and become part of the United

Church. The dispute in the Nova Scotia Courts was mainly whether the meeting of July 27, 1925, was duly convened.

On appeal to the Supreme Court of Canada that Court (Duff J. dissenting) held that after the union became effective on June 10, 1925, there was no means by which the congregation could enter the United Church. Accordingly the judgment of the Supreme Court of Nova Scotia was varied by striking out the declaration above mentioned. The appeal to the Supreme Court of Canada is reported at [1929] S. C. R. 452.

1930. April 29; May 1, 2. *Tilley K.C.* for the appellants. *H. P. Mackeen* and *F. J. Tucker* for the respondents.

June 23. The judgment of their Lordships was delivered by

Lord Macmillan. Profiting by the experience of the Presbyterian Churches which united in Scotland in 1900 the Canadian Churches which proposed to unite in 1925 adopted the safer course of invoking in advance the sanction of the legislature to their union. They have, nevertheless, not been entirely successful, as the present appeal shows, in avoiding the pitfalls which seem to lie in the path of all legislative efforts to deal with ecclesiastical affairs. A special complication besetting legislation in the case of the uniting Churches in Canada arose from the circumstance that it was necessary to resort both to the Dominion legislature and to the several Provincial legislatures. Inasmuch as the organizations and activities of the uniting Churches extended throughout the whole Dominion the Parliament of Canada alone could merge and incorporate them as a single United Church of Canada. On the other hand, inasmuch as the property of the uniting Churches was distributed throughout the Provinces, the disposal of church property in each Province consequent upon the union was a matter for the respective Provincial legislatures in the exercise of their privative power to deal with Provincial property and civil rights. The requisite statutes were accordingly passed by the Dominion and the Provincial legislatures respectively, the design being to secure by their co-operation the enactment of a coherent and consistent scheme for the constitution of the United Church and the regulation of its property. It was, however, inevitable that the Dominion statute incorporating the United Church should deal with the transference of the property of the uniting Churches to the new corporation, notwithstanding the distribution of the property throughout the Provinces. Such Dominion legislation might have sought justification in the accepted principle that the Parliament of Canada is entitled to deal with Provincial property and civil rights in so far as may be necessary to enable it to legislate effectually on a matter within its competence.

Sect. 29 of the Dominion Act obviously hesitates a doubt on the subject, for it runs as follows: "Inasmuch as questions have arisen and may arise as to the powers of the Parliament of Canada under the British North America Act to give legislative effect to the provisions of this Act, it is hereby declared that it is intended by this Act to sanction the provisions therein contained in so far and in so far only as it is competent to Parliament so to do."

The difficulty was surmounted by inserting in the Nova Scotia Act and in some at least of the other Provincial Acts a section declaring that "the provisions of the Act of incorporation shall have full force and effect with respect to any property or civil rights within this Province."

The substantive question in the present case is whether the congregation of St. Luke's Presbyterian Church at Saltsprings in the Province of Nova Scotia is or is not, in view of the events which have happened and the relative legislation, a congregation of the United Church of Canada. To determine this question it is necessary to examine the provisions of both the Dominion Act of Incorporation and the Nova Scotia Provincial statute in their relation to the facts of the case.

The Dominion statute incorporating the United Church of Canada was assented to on July 19, 1924, and by s. 2 came into force on June 10, 1925, except the provisions required to permit the vote provided for in s. 10 being taken, which came into force on December 10, 1924. The scheme of the

Act is clear and simple. The preamble recites that the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches of Canada had adopted a basis of union scheduled to the Act and had agreed to unite and form one body or denomination of Christians under the name of "The United Church of Canada." By s. 4 it was provided that the union of the three Churches should become effective upon the day upon which the Act came into force, i.e., June 10, 1925, and the three Churches as so united were thereby constituted a body corporate and politic under the name of "The United Church of Canada." The congregations of the three Churches were by the operation of this section merged in the United Church and became congregations of that Church. Sect. 5 provided for the vesting in the United Church from and after June 10, 1925, of the general property belonging to the uniting Churches, and s. 6 provided that, subject to the provisions of s. 8, from and after June 10, 1925, the property of every congregation of the uniting Churches should be held for the benefit of the same congregation as a part of the United Church.

It was, however, contemplated that some congregations might not concur in the union. To meet their case it was enacted in s. 10 that if any congregation of any of the uniting Churches should at a meeting held within six months before June 10, 1925, decide by a majority of votes not to enter the union the property of such non-concurring congregation should remain unaffected by the Act, and s. 4 (*c*) provided that members of any non-concurring congregation should be deemed not to have become members of the United Church. Elaborate provisions are contained in ss. 10 and 11 to safeguard the position of non-concurring congregations, including the appointment of a Commission to secure to them a fair and equitable apportionment of property.

Under this scheme every congregation of the three uniting Churches had presented to it the option of associating itself with or dissociating itself from the union. If within the six months between December 10, 1924, and June 10, 1925, a congregation decided in accordance with the procedure

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prescribed in the Act not to concur in the union, it thereby effectually excluded itself from the merger which took place on June 10, 1925, and became entitled to the rights and privileges of a non-concurring congregation as set out in the Act. A congregation which took no steps during the six months preceding June 10, 1925, to vote itself out of the union automatically entered the United Church and became subject as regards its constitution and its property to the whole provisions applicable to the United Church and its congregations.

Now the congregation of St. Luke's with which this appeal is concerned, at a meeting of the congregation held on December 22, 1924, as to whose regularity no question is raised, duly decided by a majority not to enter the union. The meeting complied with the requirements of s. 10 of the Dominion statute and by its decision the congregation became within the meaning of the Act a non-concurring congregation to which on June 10, 1925, all the statutory provisions relating to non-concurring congregations became applicable.

On July 27, 1925, however, there was held what purported to be a meeting of the congregation at which it was resolved by the unanimous vote of those present, being one hundred members out of a total membership of one hundred and sixty-four, that St. Luke's Presbyterian Church should concur in the union of the Churches and become part of the United Church of Canada. The present controversy concerns the competency, the regularity and the efficacy of this resolution.

So far as regards the Dominion statute there is no provision made for the reversal, either before or after June 10, 1925, of a decision of non-concurrence by a congregation. In any case the decision by the congregation on December 22, 1924, not to concur in the union stood unaltered at June 10, 1925, and under the Dominion Act it accordingly remained outside the union and came within all the provisions of the Act applicable to non-concurring congregations.

To understand the question which has arisen it now becomes necessary to turn to the Nova Scotia Act. This statute was passed by the Provincial legislature on May 9, 1924, and under s. 29 came into operation on the incorporation of the United Church by the Dominion Act on June 10, 1925. The preamble, after reciting that the three Churches have agreed to unite in terms of the basis of union and have petitioned the Parliament of Canada to incorporate the United Church, proceeds to narrate that application has been made to the legislature of the Province "to enact as hereinafter set forth with regard to the property rights and powers hereinafter mentioned." The Act, of course, contains no provisions as to the constitution and incorporation of the United Church, but proceeds at once to provide in ss. 3 to 7 inclusive for the disposal of the Provincial property of the three Churches and their congregations on the union becoming effective on June 10, 1925. Those sections correspond and are practically identical with ss. 5 to 9 inclusive of the Dominion Act. Unfortunately the parallelism between the two enactments is not maintained. The Dominion Act in s. 10 proceeds to deal with the case of congregations which within the six months preceding union decide not to concur. The Nova Scotia Act, which up to this point makes no reference to non-concurrence, proceeds in s. 8 to enact as follows: "8. (*a*) Provided always that if any congregation in connection or communion with any of the negotiating churches shall at a meeting of the congregation regularly called and held within six months after the coming into force of this section decide by a majority of votes of the persons present at such meeting and entitled to vote thereat not to concur in the said union of the said churches then and in such a case the property real and personal belonging to or held in trust for or to the use of such non-concurring congregation shall be held by the existing trustees or other trustees elected by the congregation for the sole benefit of said congregation. Should such congregation decide in the manner aforesaid at any later time to enter the union and become part of the United Church then this Act shall apply to the congregation and all the property thereof from the date of such decision."

There are several observations to be made upon this enactment. In contrast with the Dominion statute which provided for the exercise within six months *before* the incorporation of the United Church of the option not to concur the Provincial legislature here contemplates a resolution not to concur being passed within six months *after* the incorporation of the United Church and a possible further decision " at any later time " to enter the union. To have provided in the Dominion statute for the passing of a resolution not to concur within six months after the incorporation of the United Church would have been quite inconsistent with the scheme of incorporation which drew the line at June 10, 1925, and automatically included in the United Church all congregations which had not within the preceding six months decided not to concur while it equally excluded all such congregations as had so decided. As the Nova Scotia Act makes no reference to the case of a congregation deciding before June 10, 1925, not to concur in the union, ss. 3 and 4 of that Act read by themselves without reference to the Dominion Act would apparently affect the property of all congregations of the uniting Churches notwithstanding that a particular congregation might under the Dominion Act have decided before June 10, 1925, not to concur in the union. The Dominion Act provides for a congregation remaining outside the union by a vote taken before union while the Provincial Act provides only for taking a congregation out of the union after it has been brought in. Sect. 8 (*a*) of the Nova Scotia Act does not, however, profess to *enable* congregations, on the one hand, to decide not to concur within six months after the incorporation of the United Church or, on the other hand, at any later time to decide to enter the union. It assumes the taking of such decision by a congregation and prescribes what shall be the effects thereof on property. Indeed, s. 8 (*a*), which begins with the words " Provided always," is in the form of a proviso to the preceding sections relating to church and congregational property; it does not profess to affect the constitution of the United Church, and in their Lordships' view could not competently do so.

The fundamental question would therefore appear to be whether s. 8 (*a*) affords any competent statutory warrant (1.) for a congregation which, by not deciding within six months *before* June 10, 1925, not to concur, has under the Dominion Act automatically become a congregation of the United Church, deciding within six months *after* June 10, 1925, not to concur in the union, or (2.) for a congregation which has decided within six months before June 10, 1925, not to concur in the union subsequently deciding to enter the union, with the consequential effects on church property prescribed by s. 8 (*a*). Their Lordships are of opinion that s. 8 (*a*) does not competently authorize either of such steps. The constitution of the United Church was a matter solely for the Parliament of Canada, and it was for that Parliament to define the conditions of membership of the corporation which it set up. The Provincial legislature could not competently alter the conditions of membership of the United Church and nowhere avowedly attempts to do so. Sect. 8 (*a*) of the Provincial Act in providing certain consequences as regards property which are to follow decisions of congregations either not to concur in the union or to enter the union does not and could not properly empower congregations to take such decisions affecting, as they must necessarily do, the constitution of the United Church. If such decisions cannot be taken consistently with the constitution of the United Church as defined by the Parliament of Canada then the consequences as regards property of such decisions cannot become operative. The authors of the Provincial Act of Nova Scotia which was passed on May 9, 1924, may, for aught their Lordships know, have contemplated that the Dominion statute, which was not assented to till July 19, 1924, would contain provisions for congregations deciding after June 10, 1925, not to concur in the union or at a later time deciding to enter the union and may have thought it right to legislate for the consequences on property of such decisions should they be authorized by the Dominion legislature, which, however, did not prove to be the case.

Their Lordships, while finding in the Dominion statute no warrant for such decisions as are contemplated in s. 8 (*a*) of the Provincial statute, are not to be taken as holding that once a congregation has decided under s. 10 of the Dominion statute not to concur in the union it is for ever after debarred from being received into the United Church. Far from it. The basis of union scheduled to and ratified by s. 26 of the Dominion Act under head A dealing with "Charges existing previous to the Union" expressly refers in para. 8 to "congregations received subsequent to the Union into the United Church." And s. 8 deals with the property of "a congregation received into the United Church after the coming into force of this Act" as does also s. 6 of the Provincial Act. No procedure, however, is prescribed in the Dominion statute for the reception of a congregation into the United Church after June 10, 1925, nor is it specified how an effective decision may be taken by a congregation with a view to its reception. As the Provincial statute could not, in their Lordships' view, effect the subsequent entry of a congregation into the union the case has thus not been competently provided for in either statute. Appropriate legislative measures can readily be taken, if so desired, to deal with the matter.

Their Lordships, being of opinion that St. Luke's Congregation having duly decided before June 10, 1925, not to concur in the union could not at their own hand competently or effectively decide after June 10, 1925, by a majority to enter the Union, have considered whether the resolution of July 27, 1925, could be treated as a decision to apply to the United Church for reception with the effect, if the application were acceded to, of enabling the congregation to enter the United Church and by virtue of s. 8 (*a*) to carry its property with it. There are, in their Lordships' view, insuperable difficulties in the way of so interpreting the situation. Sect. 8 (*a*) in terms speaks of a decision at any later time to enter the Union and become part of the United Church and the resolution of July 27, 1925, was a resolution to concur in the union and to become part of the United Church. Such a decision could not be effectively taken if s. 8 is read literally. But reading it as a resolution to apply for reception by the United Church which, by the way, would not be a decision in terms of s. 8 (*a*), then the concluding words of s. 8 (*a*) manifestly could not apply. For on a decision being taken under the last sentence of s. 8 (*a*) "this Act shall apply to the congregation and all the property thereof from the date of such decision." The Act with all its consequences might properly enough apply if the congregation could by force of its own decision enter the union and become part of the United Church. But how could it reasonably apply to the congregation and its property from the date of a decision to apply for reception, for the United Church might decline to receive it? Incidentally, if the Nova Scotia Act became applicable to all the property of St. Luke's congregation such congregational property as is dealt with in s. 6 would not be transferred without the consent of a meeting of the congregation regularly called for the purpose. No such meeting has been held.

To subject the fate of a congregation and its property to the decision of a majority of votes of its members would, in their Lordships' view, require clear enabling words, competently enacted. If the words of the concluding sentence of s. 8 (*a*) in their literal sense imply a power on the part of a congregation to enter the union at their own hand, then this enactment was beyond the competence of the Provincial legislature as affecting the constitution of the United Church which was a matter solely for the Parliament of Canada. If it is sought to use the enactment as impliedly authorizing a decision by a majority of a congregation to apply for reception by the United Church this reading, even if such legislation was competent to the Provincial legislature, is plainly inadmissible, for the decision which the enactment contemplates is to have effect on the congregation and all its property from the date of such decision, and this could not be intended in the case of a mere decision to apply for reception which might be refused.

Their Lordships have not failed to notice the point that a decision at a later time to enter the union presupposes under s. 8 (*a*) of the Nova Scotia Act a previous decision not to concur in the union, which previous decision would apparently have to be one taken within six months *after* the union. The previous decision in the case of St. Luke's was taken within six months *before* the union. This interposes a further difficulty. An amending Act was passed by the Nova Scotia legislature on May 7, 1925, which added to s. 8 of the principal Act the following sub-section: "(*d*) 1. Any vote on the question of entering the said union taken in a congregation prior to the coming into force in pursuance of and in accordance with the provisions of the Act of incorporation shall be deemed to be the vote of such congregation for the purposes of this Act." This may enable the decision not to concur which was reached by the congregation of St. Luke's on December 22, 1924, before the Nova Scotia Act came into force to be reckoned as a vote of the congregation for the purposes of the Nova Scotia Act, but it does not appear to deem a decision taken on December 22, 1924, to be a decision taken between June 10 and December 10, 1925, which is what s. 8 (*a*) of the Nova Scotia Act appears to require as a condition precedent of a decision at a later time to enter the union.

The views which their Lordships have hitherto expressed assume that the meeting of July 27, 1925, was a valid meeting. But the regularity of that meeting and not the aspect of the case with which their Lordships have so far dealt was the point round which controversy centred in the Courts below. It is obvious that the meeting was open to criticism in matters of procedure, but their Lordships do not feel called upon to enter upon the question whether such criticism was necessarily fatal to the validity of the decision then taken. If such a decision, even if taken by a meeting otherwise unexceptionably regular, would have been, as their Lordships hold, without competent statutory warrant, it becomes unnecessary to discuss the numerous alleged irregularities of procedure charged against it which are discussed at great length in the judgments of the learned judges who considered the case in Canada. In the result their Lordships find themselves in general agreement with the view of the case taken by the learned Chief Justice of Canada which had

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the support of Newcombe, Rinfret and Smith JJ., and they are unable to accept the arguments of the appellants notwithstanding the powerful assistance which they derive from the dissenting judgment of Duff J.

Their Lordships, however, consider that the formal judgment of the Supreme Court of Nova Scotia of April 9, 1927, which was varied by the formal judgment of the Supreme Court of Canada of February 5, 1929, by striking out the fourth paragraph thereof should be further varied by deleting from the second paragraph thereof sub-paragraph "(2.) that the Reverend Robert Johnston was at all material times and is moderator pro tempore or interim moderator of the said congregation," and also by deleting from the third paragraph thereof the following words with which that paragraph concludes "and from interfering with the exercise by the plaintiff Robert Johnston of the rights, powers and privileges of the office of moderator pro tempore or interim moderator of the said congregation." Their Lordships are not prepared to pronounce upon the position occupied by Mr. Johnston and do not find it necessary for the disposal of the case to do so.

Subject to this variation their Lordships will humbly advise His Majesty that the judgment appealed from be affirmed and the appeal dismissed with costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

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CANADIAN PACIFIC RAILWAY COMPANY AND OTHERS . . . . APPELLANTS;

AND

TORONTO TRANSPORTATION COMMISSION AND OTHERS . . . RESPONDENTS.

[AND CROSS-APPEAL.]

TORONTO TRANSPORTATION COMMISSION . . . . APPELLANTS;

AND

CANADIAN NATIONAL RAILWAYS AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Railways—Jurisdiction of Railway Board—Contribution to Cost of Works ordered — Provincial Undertaking — Dominion Legislative Power.

Under s. 39 of the Railway Act of Canada (R. S. Can., 1927, c. 170) the Railway Board has jurisdiction to impose a proportion of the cost of work, which in the exercise of its powers it has ordered to be carried out, only upon a company, municipality, or person interested in or affected by the order. But in determining whether a particular company, municipality or person is so interested or affected the Railway Board can have regard to the circumstances existing not only when the work was ordered but also when it makes its order allocating the cost, or reviews that order under s. 51; further, absence of benefit from the work executed does not necessarily show absence of interest in or affection by the order to carry out the work. In cases in which the Railway Board has jurisdiction the amount of the contribution is within the discretion of the Board.

The section is not invalid to the extent to which it enables the Railway Board to order a Provincial undertaking to contribute.

Accordingly, the Railway Board had jurisdiction to order that the Toronto Transportation Commission, in which body the street railways of Toronto were vested by an Ontario statute of 1920, should contribute a proportion of the cost of works ordered to be carried out in each of the following cases: (1.) Two Dominion railways, which crossed a street in Toronto on the level, were ordered to construct subways so that the street should pass under their lines; the street railways ran along the street, but had avoided that part where the level crossings were by a wide detour; before the order allocating the cost the street railways were run through the subways. (2.) The railway companies were also ordered to make a subway in lieu of a level crossing in another street; the street railways did not, before or after the order, run along the street, but the making of an approach to the subway involved altering a street they ran along, and so made it necessary to relay their tracks. (3.) A Dominion railway was ordered to rebuild at its own cost a bridge carrying a street over its line; at the date of the order the Commission had not been incorporated, but before a review under s. 51 of the order it had come into existence and was running its street railway over the bridge.

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* *Present:* LORD SANKEY L.C., LORD BLANESBURGH, LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

British Columbia Electric Ry. Co. v. *Vancouver, Victoria and Eastern Ry. Co.* [1914] A. C. 1067 distinguished.

Toronto Ry. Co. v. *Toronto City* [1920] A. C. 426 followed.

Judgment of the Supreme Court of Canada [1930] S. C. R. 73 varied, and judgment of that Court [1930] S. C. R. 94 affirmed.

CONSOLIDATED APPEAL AND CROSS-APPEAL (No. 16 of 1929) by special leave from a judgment of the Supreme Court of Canada delivered on September 26, 1929; and, heard therewith,—

APPEAL (No. 19 of 1929) by special leave from a judgment of the above Court delivered on the same date.

The question for determination in each of the appeals was whether in the circumstances applicable thereto the Board of Railway Commissioners for Canada (hereinafter referred to as "the Railway Board") had jurisdiction to order that the Toronto Transportation Commission, in which the street railways of Toronto were vested by an Ontario statute of 1920 (10 & 11 Geo. 5, c. 144), should contribute a proportion of the cost of works in Toronto which the Railway Board had ordered to be carried out by Dominion railway companies in the exercise of its powers under the Railway Act of Canada.

By the consolidated appeal the Canadian Pacific Railway Company and the Canadian National Railways appealed from so much of the judgment of the Supreme Court as by a majority (Mignault, Newcombe, and Lamont JJ.; Anglin C.J. and Smith J. dissenting) set aside an order (No. 40,367) of the Railway Board so far as it directed that the Toronto Transportation Commission should contribute a proportion of the cost of the Royce Avenue subway; and by the cross-appeal the Commission appealed from so much of the judgment as unanimously affirmed the said order of the Railway Board so far as it directed that the Commission should pay a proportion of the cost of the Bloor Street subways. The appeal to the Supreme Court is reported at [1930] S. C. R. 73.

The appeal heard with the consolidated appeal was by the Toronto Transportation Commission from a judgment of the Supreme Court, which by a majority (Anglin C.J. and Newcombe, Lamont, and Smith JJ.; Mignault J. dissenting) affirmed an order (No. 40,120) of the Railway Board directing that its previous order (No. 29,923) be amended so as to provide that a proportion of the cost of rebuilding the bridge carrying the lines of the railway over Main Street should be paid by the Commission. The appeal to the Supreme Court is reported at [1930] S. C. R. 94.

The facts and the material provisions of the Railway Act of Canada appear from the judgment of the Judicial Committee.

1930. May 19, 20. *Tilley K.C.* for the Canadian Pacific Railway Company, the Canadian National Railways and the Toronto Corporation.

D. L. McCarthy K.C. and *I. S. Fairty K.C.* for the Toronto Transportation Commission.

In addition to the cases mentioned in the judgment reference was made to *Toronto Corporation* v. *Canadian Pacific Ry. Co.* (1); *Grand Trunk Pacific Ry. Co.* v. *Fort William Land Investment Co.* (2); *In re Canadian Pacific Ry. Co.* (3); *Toronto Ry. Co.* v. *City of Toronto.* (4)

July 18. The judgment of their Lordships was delivered by

LORD MACMILLAN. These appeals are concerned with the validity of orders pronounced by the Board of Railway Commissioners for Canada whereby the Toronto Transportation

(1) [1908] A. C. 54.
(2) [1912] A. C. 224, 228.
(3) (1898) 25 Ont. A. R. 65.
(4) (1916) 53 Can. S. C. R. 222.

Commission was required to contribute to the cost of certain works directed by the Railway Board to be carried out within the City of Toronto. Three quite distinct undertakings are involved—namely, the Bloor Street subways, the Royce Avenue subway and the Main Street bridge. The consolidated appeals relate to the first two works which were dealt with together by the Railway Board; the separate appeal relates to the third work. It is necessary to examine the circumstances of each separately.

I.—THE BLOOR STREET SUBWAYS.

The recent rapid growth of the City of Toronto has converted into busy main thoroughfares a number of roads which formerly lay on the outskirts of the city and the danger arising from the existence of railway level crossings on these roads caused the city corporation in view of the increasing traffic to take action for their removal. Bloor Street, one of the most important of these thoroughfares, runs east and west through the north-western section of the city. When the works now in question were ordered it was crossed on the level at one point by a series of lines of the Canadian National Railways and Canadian Pacific Railway Company, and at another point, some 400 yards to the east, by a line of the Canadian National Railways. These level crossings were situated in the portion of Bloor Street lying between the points where it is intersected by Lansdowne Avenue and Dundas Street respectively. There has for many years been a street railway or tramway on Bloor Street but between the points of its intersection by Lansdowne Avenue and Dundas Street there was a gap in the street railway which here made a wide detour avoiding the crossings and rejoining Bloor Street beyond them. Passengers could either go round the detour in a street car or dismount and walk across the railway lines and intervening space, re-entering the street car on the further side.

The street railways in Toronto, which were originally operated partly by the city corporation and partly by the Toronto Railway Company, passed in 1921 entirely into the possession of the corporation which entrusted the working of them to an organization incorporated for the purpose on August 3, 1920, under the name of the Toronto Transportation Commission, by an Act of the Ontario Legislature. The Commission assumed the management of the system on September 1, 1921. Its statutory duties include the construction, control, maintenance, operation and management of new lines of street railway in addition to or in extension of existing lines. The system is worked as a service-at-cost undertaking, the tolls and fares being so fixed as to furnish it with a sufficient revenue to render it self-sustaining.

The two level crossings on Bloor Street were long regarded as a source of danger and as early as 1891 gates and watchmen were provided for the protection of the public at the first mentioned crossing by order of the Railway Committee of the Privy Council, the predecessors of the present Railway Board. Similar safeguards were ordered at the other crossing in 1908.

In November, 1922, the city corporation applied to the Railway Board under ss. 257 and 259 of the Railway Act, 1919, a statute of the Dominion Legislature, for an order requiring the Canadian National and Canadian Pacific Railway Companies to collaborate with the corporation in the preparation of a joint plan for the separation of grades or elimination of level crossings at various places in the north-western section of the city, including the Bloor Street crossings. The parties agreed to report to the Railway Board and plans were subsequently submitted and discussed. At a hearing by the Railway Board in January, 1924, one of the reasons advanced by representatives of the city and of the ratepayers for requiring protection by grade separation at the Bloor Street crossings was that by this means the Transportation Commission would be enabled to extend its lines across the existing gap and so to afford a better service. The Transportation Commission, which had not previously appeared in the proceedings, was notified and thereafter was represented at the subsequent hearings under reservation of its rights. It took up throughout the attitude that the construction of the proposed works was immaterial to it. Ultimately the Railway Board on May 9, 1924, approved plans submitted by the Canadian Pacific Railway Company for the construction of subways to carry Bloor Street under the railway lines at both level crossings and on May 21, 1924, ordered the work to proceed, reserving all questions as to the distribution of the cost.

Thereafter the Transportation Commission, on July 15, 1925, applied to the Railway Board for an order under s. 252 of the Railway Act sanctioning the construction by the Commission of a double line of street railway along Bloor Street between Lansdowne Avenue and Dundas Street through the new subways and over the intervening space, thus doing away with the existing gap and providing a continuous line along the street. The application, which was made without prejudice to any submissions which the Commission might see fit to make with reference to the jurisdiction of the Railway Board in the matter, was with the consent of the railway companies granted on August 13, 1925, by the Railway Board, which reserved for further consideration the question of contribution by the Commission to the cost of the subways. The Commission accordingly proceeded to lay down street railway tracks with the necessary equipment along Bloor Street through the subways and over the intervening space. By orders dated August 21 and 22, 1925, the Railway Board authorized the new subways to be put into use.

On November 15, 1926, the Railway Board, after hearing parties, pronounced an order distributing the cost of the Bloor Street works. By this order the Railway Board, after directing certain percentages of the cost to be charged to a statutory fund known as the Railway Grade Crossing Fund, ordered that 10 per cent. of the balance should be paid by the Transportation Commission and that the remainder should be borne equally by the city corporation and the two railway companies concerned. This order was subsequently on February 16, 1928, rescinded by the Railway Board which made a new order of that date No. 40,367 varying the rescinded

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order, but not in any respect material for the present purpose. In the proceedings now before their Lordships the Transportation Commission appeals against this order No. 40,367 so far as it has been affirmed by the Supreme Court of Canada and challenges the right of the Railway Board to impose upon it any liability to contribute to the cost of the Bloor Street works.

As the order is impugned on the ground that the Railway Board had no jurisdiction to pronounce it an examination of the constitution and powers of the Board is necessary. The Board of Railway Commissioners for Canada is a statutory court of record possessing all the powers of a superior court. It succeeded to all the powers, authorities and duties of its predecessor, the Railway Committee of the Privy Council. By s. 33, sub-s. 1, of the Railway Act, 1919, there is conferred on the Board "full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested . . . . (*b*) requesting the Board to make any order or give any direction, leave, sanction or approval which by law it is authorized to make or give or with respect to any matter, act or thing which by this Act . . . . is prohibited, sanctioned or required to be done." By s. 33, sub-s. 5, it is provided that "the decision of the Board as to whether any company, municipality or person is or is not a party interested within the meaning of this section shall be binding and conclusive upon all companies, municipalities and persons." Sect. 34, sub-s. 1, empowers the Board to make orders with respect to any matter, act or thing which by the Act is sanctioned, required to be done or prohibited and generally for carrying the Act into effect. By s. 4, sub-s. 3, "the finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive."

Provision is made for review and appeal in ss. 51 and 52. Under s. 51 "the Board may review, rescind, change, alter or vary any order or decision made by it or may rehear any application before deciding it." Three modes of review are provided in s. 52. First, the Governor in Council may at any time in his discretion either upon petition of any party, person or company interested or of his own motion vary or rescind any order of the Board; secondly, an appeal is provided for to the Supreme Court of Canada upon a question of jurisdiction upon leave being obtained from a judge of that Court; thirdly, the Board may itself grant leave to appeal to the Supreme Court upon any question which in the opinion of the Board is a question of law or a question of jurisdiction or both. Save as provided in s. 52 every decision or order of the Board is declared to be final and not subject to prohibition, injunction, certiorari or any other process or proceeding in any Court.

The present appeal is within the second category. On an application by the Transportation Commission leave was on February 27, 1929, granted to the Commission by Mignault J. to appeal to the Supreme Court of Canada from the Board's order No. 40,367 of February 16, 1928, upon the questions :—

" (1.) Had the Board of Railway Commissioners for Canada under the circumstances of this case jurisdiction under the Railway Act of Canada to provide in order No. 40,367 dated February 16, 1928, that the Toronto Transportation Commission should contribute to the cost of (*a*) the Bloor Street Subways. . . . .

(2.) If the above question is answered in the affirmative . . . . had the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel contribution from the Toronto Transportation Commission, a Provincial corporation, in respect of (*a*) the Bloor Street Subways. . . . ."

On the matter coming before the Supreme Court of Canada the order of the Railway Board was unanimously affirmed as regards the Bloor Street subways. Their Lordships are now asked by the Transportation Commission, the present appellants, to advise the reversal of that decision which is supported by the two railway companies and the city corporation as respondents.

The application of the Corporation of Toronto which initiated the proceedings invoked ss. 257 and 259 of the Railway Act.

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Sect. 257, sub-s. 1, reads as follows: "257. (1.) Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected."

Sect. 259 provides: "259. Notwithstanding anything in this Act, or in any other Act, the Board may . . . . order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person in respect of any order made by the Board, under any of the last three preceding sections, and such order shall be binding on and enforcible against any railway company, municipal or other corporation or person named in such order."

In addition to the power conferred on the Railway Board by s. 259 of apportioning the cost of works ordered by it under (inter alia) s. 257 there is included among an earlier group of sections headed "General Jurisdiction and Powers," s. 39, which enacts as follows:—

"39. (1.) When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

(2.) The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid."

The applicability of s. 39 to the works in question was not contested. It could not well be in view of the judgment of the Judicial Committee in the case of *Toronto Ry. Co.* v. *Toronto City* (1), in delivering which Viscount Finlay, dealing with s. 59 and s. 238, sub-s. 3, of the Railway Act, 1906, as amended by the Railway Act, 1908 (with which ss. 39 and 259 of the present Railway Act correspond), said : "The power given by s. 59 applies in the case of any order made by the Board in the exercise of any power vested in it by the Railway Act," and pointed out that if the order there impugned could be supported under s. 59 it was unnecessary to consider whether it could also be supported under s. 238, sub-s. 3. Accordingly, if the order impugned in the present case can be supported under s. 39 of the Railway Act, 1919, it is unnecessary to consider whether it could also be supported under s. 259. It was also common ground that the present case was not "otherwise expressly provided" for in the Act.

The language of s. 259 is wide but that of s. 39 is wider still. Indeed, if sub-s. 2 of s. 39 is read by itself it would seem to empower the Railway Board to order any person whomsoever to bear or contribute to the cost of works

(1) [1920] A. C. 426, 437.

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ordered by it. Sub-s. 2 of the former s. 59 was open to the same observation and is thus dealt with in the case just cited. (1) "There is not in sub-s. 2 any definition of the class of persons who may be ordered to pay such expenses, but it seems clear that sub-s. 2 must be read with reference to the immediately preceding provision and that such an order may be made only on a company, municipality or person interested in or affected by the order directing the works."

The question at issue may thus be narrowed down to this—Was the Transportation Commission "interested or affected by" the order for the construction of the Bloor Street subways within the meaning of s. 39? The finality provisions quoted above from the Railway Act have not in the past been held to preclude the Courts in Canada or their Lordships' Board in other cases from determining on appeal as a question of law whether a company, municipality or person was interested or affected within the meaning of the statute so as to confer jurisdiction on the Railway Board. Accepting that view their Lordships proceed to consider the position of the Transportation Commission in relation to the works in question.

The material facts are (1.) that when the order to construct the works was made by the Railway Board the street railway did not cross the railway lines under which the subways were to be constructed and the street railway system was physically clear of the level crossings which were to be eliminated; (2.) that no alteration of the street railway was necessitated by the construction order; (3.) that the elimination of the level crossings and the construction of the subways rendered it practicable to continue the street railway along Bloor Street and to do away with a gap in the street railway system; (4.) that before the subways were completed and opened for traffic the Transportation Commission applied to the Railway Board for an order, which was granted, authorizing it to construct a double track of street railway connecting up its Bloor Street lines through the new subways, which work was duly executed, the trolley wires, etc., being carried through the subways and attached to the structures.

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(1) [1920] A. C. 435, 436.

On these facts, was the Transportation Commission interested in or affected by the construction of the subways ?

Sect. 39 does not indicate any criterion by which it may be determined whether a person is interested in or affected by an order of the Railway Board. It does not even prescribe that the interest must be beneficial or that the affection must not be injurious. The topic has in a number of cases in the Canadian Courts been much discussed but inevitably little elucidated. Where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision.

If the street railway had intersected the other railways at the level crossings in question at the time when the order for the construction of the subways was made the cases of *Toronto Corporation* v. *Canadian Pacific Ry. Co.* (1) and *Toronto Ry. Co.* v. *Toronto City* (2) would afford sufficient authority for holding that the Transportation Commission was interested in or affected by the works ordered. In that case the street railway would have come within s. 8 of the Railway Act which subjects Provincial railways (including, by the definition in s. 2, sub-s. 21, street railways and tramsways) which cross Dominion railways to the provisions of the Railway Act relating to the crossing of one railway by another. It may be noted that that section refers to Provincial railways which may hereafter cross any Dominion railway. The case of *British Columbia Electric Ry. Co.* v. *Vancouver, Victoria and Eastern Ry. Co.* (3) relied on by the Transportation Commission does not assist them. The analysis of that case in *Toronto Ry. Co.* v. *Toronto City* (2) demonstrates that it is not an authority on the present question and the points of distinction there emphasized need not be repeated.

(1) [1908] A. C. 54.
(2) [1920] A. C 426.
(3) [1914] A. C. 1067.

Does then the fact that at the time of the order for the construction of the subways the street railway of the Transportation Commission did not cross the other railways deprive the Railway Board of jurisdiction to order the Commission to contribute to the cost of the subways? In their Lordships' opinion this circumstance, while no doubt an important negative element, is not necessarily conclusive of absence of interest or affection. The whole circumstances must be taken into account. In the present instance there can be no question that the existence of the level crossings with their attendant danger constituted a barrier across the route of the Commission's Bloor Street railway. The Commission maintained that the removal of the crossings was immaterial to it but this is hardly consistent with its immediate utilization of the substituted subways for linking up the detached ends of its system. Indeed, the situation of the level crossings was such that their removal could not but affect and affect beneficially the street railway; that it was so affected is best shown by the fact that whenever the danger was removed the Commission very properly at once availed itself of the facility provided by the new subways to complete one of its important through routes. At the time when the order for contribution was made the Commission, under an order it had itself obtained from the Railway Board before the subways were completed, was running its cars through the subways. In their Lordships' opinion the Railway Board when making an order for contribution to the cost of works is entitled to have regard to the state of matters existing when the order for contribution is made. The Board when it made the order now under appeal had before it evidence which satisfied it that the Commission was interested in or affected by the construction of the subways. The judges of the Supreme Court of Canada took the same view. Their Lordships see no reason to differ from this conclusion which is consonant with the plain facts of the case.

Once it is established that the Commission was within the meaning of the Railway Act interested in or affected by the construction of the subways the jurisdiction of the Railway Board under the Act to order it to contribute to the cost of the works is unassailable. The question of the quantum of the contribution is a matter entirely in the discretion of the Railway Board with which their Lordships are not concerned.

It remains to notice the plea advanced that if the Railway Act on a sound construction authorized, as their Lordships hold it does, the making of the order under appeal affecting a Provincial undertaking, then the Act itself is to this extent beyond the competence of the Dominion Legislature. The point was only faintly raised before their Lordships. It was finally disposed of in the two cases in 1908 and 1920 above cited and may be negatived without further discussion.

II.—THE ROYCE AVENUE SUBWAY.

The facts relating to this undertaking differ materially from those of the Bloor Street subways. Royce Avenue runs east and west parallel to and about three-quarters of a mile north of Bloor Street. At its west end it crossed on the level the same lines of the Canadian National and Canadian Pacific Railways as were crossed by Bloor Street further south. Just beyond the point where it crossed the railways on the level Royce Avenue joined practically at right angles an important thoroughfare known as Dundas Street running in a north-westerly direction and closely adjoining the railway lines. For some distance to the south of the junction of the two roads Dundas Street runs parallel to the railway lines, but as it approached the junction it trended off to the west and at the point of junction its line of direction was at an acute angle with the railway lines from which it was gradually diverging. The problem of eliminating the level crossing on Royce Avenue by the construction of a subway carrying the roadway under the railway lines was complicated by the existence of this junction between Royce Avenue and Dundas Street immediately beyond the level crossing. As the subway required to have a clearance of 14 feet it was necessary to lower the existing level of Royce Avenue substantially with the result that at the former point of junction it would be at a considerably lower level than Dundas Street. In order to re-effect the junction with Dundas Street the alternatives were either to lower Dundas Street to meet Royce Avenue as it emerged from the subway or to slew Dundas Street on its existing level further to the west, thus allowing space for Royce Avenue to ascend and rejoin it. The latter course was adopted, but instead of constructing a single new junction Royce Avenue as it left the subway was bifurcated and two sloping roadways were constructed one going in a north-westerly direction and the other in a southerly direction and both joining Dundas Street on its altered line at an easy angle of approach. There has never been a street railway on Royce Avenue but on Dundas Street there is an important street railway operated by the Toronto Transportation Commission.

It is unnecessary to detail the history of the procedure before the Railway Board with regard to the Royce Avenue subway, for it was dealt with simultaneously with the Bloor Street subways and included in the same series of orders already described. It is only necessary to note the following points of distinction: (1.) There was a separate order of the Railway Board dated May 23, 1910, requiring the provision of watchmen and gates at the Royce Avenue level crossing for the protection of the public; (2.) there was of course no application by the Transportation Commission to construct a track through the Royce Avenue subway, such as there was in the case of the Bloor Street subways; and (3.) there was a separate order dated January 15, 1926, authorizing the opening for traffic of the Royce Avenue subway. The construction order of May 21, 1924, and the allocation of cost order No. 40,367 of February 16, 1928, included and applied to both the Bloor Street and the Royce Avenue subways and the two cases were appealed together to the Supreme Court by the Transportation Commission on the same questions as are set out above in the case of the Bloor Street subways, the Royce Avenue subway being included as head (*b*) in these questions.

The matter for determination in this case also is the same—namely, whether the Transportation Commission was "interested or affected by" the order for the construction of these works so as to give the Railway Board jurisdiction to impose upon it liability to contribute to their cost. In this instance, however, there has been a difference of opinion among the judges of the Supreme Court of Canada. The learned Anglin C.J. and Smith J. held that the Railway Board had jurisdiction to order the Commission to contribute to the cost of the works in respect of the Commission's interest in them; while Mignault, Lamont and Newcombe JJ. held that the Commission was not so interested in or affected by the works as to give the Railway Board jurisdiction to order the Commission to contribute to the cost. In the result the appeal was allowed as regards the Royce Avenue subway and the order of the Railway Board to this extent set aside. The Canadian National Railways and Canadian Pacific Railway Company now appeal to His Majesty in Council against the judgment of the Supreme Court in so far as it set aside the order on the Transportation Commission to contribute to the cost of the Royce Avenue subway. The Corporation of Toronto while technically a respondent supports the appeal, which is resisted by the Transportation Commission.

The conflicting points of view of the majority and the minority respectively in the Supreme Court may best be indicated by the following quotations from the opinions delivered.

Mignault J. (with whom Lamont J. concurred) said: "The appellant (the Toronto Transportation Commission) does not use the subway nor has it any line on Royce Avenue. And as to the diversion on Dundas Street which it now uses, it suffices to say that this diversion was decided upon to afford an easy approach to the subway. Not being interested in the latter, the appellant cannot be said to have an interest in the diversion, which was, moreover, the cause of additional expense to it, for it became necessary to lay new tracks along the diverted road." Newcombe J. agreed. He thought the case seemed to suggest that "the Board was anticipating value which might be realised when, if ever, a branch of the tramway is constructed upon the subway."

Anglin C.J. (with whom Smith J. concurred) said: "We find it impossible to hold that it has been shown that the Transportation Commission has not a present interest, different in kind from that of the ordinary residents in, or users of, the City streets, in the changes effected by the Order of the Board in connection with the subway, still less that it is wholly unaffected by an Order which provides for the removal of its tracks somewhat to the west and for the construction of the two ramps above referred to, thus dividing the traffic from Royce Avenue so that it will approach the lines of the street railway at angles much more acute than theretofore."

The chief feature which distinguishes this case from that of the Bloor Street subways is that the Transportation Commission has never had any track on Royce Avenue and has not availed itself in any way of the new subway, although it was represented to the Railway Board by the promoters of the works that the Commission might in the future lay a track along Royce Avenue through the new subway. This feature is important in determining the presence or absence of interest or affection but does not in their Lordships' opinion conclude the matter in favour of the Commission. The subway works formed a single engineering undertaking of which the lowering of Royce Avenue, the construction of the subway, the formation of the approach slopes to Dundas Street and the diversion of Dundas Street to allow these sloping ways to rejoin it on the level were all integral parts and the whole works were designed to remove a public danger due to the presence of the Royce Avenue level crossing in the manner best calculated to suit the convenience of all concerned. The question, as their Lordships conceive it, is not whether the Transportation Commission was benefited by the execution of the works, although the plan adopted of diverting Dundas Street on the level was presumably preferable from the point of view of the street railway to forming a dip in the street at the former junction while the two tangential sloping ways presumably admitted the traffic from Royce Avenue to Dundas Street in a safer manner than if there had been a single junction almost at right angles. The question rather is whether the Transportation Commission as the operator of the street railway on Dundas Street was interested in or affected by the engineering works designed for the removal of the dangerous level crossing on Royce Avenue. To the question so stated their Lordships are satisfied that the answer must be in the affirmative. The Commission had to adapt its track to the diversion of Dundas Street which was an essential part of the works ordered and admittedly properly ordered by the Railway Board. That being so, the Commission was plainly interested in or affected by the works ordered by the Railway Board and consequently could competently be required to contribute to the cost thereof. The propriety of requiring it to do so and the extent of the contribution ordered are matters on which their Lordships are not called upon to pronounce.

Their Lordships will accordingly humbly advise His Majesty that in the consolidated appeals from the judgment of the Supreme Court of Canada of September 26, 1929, the appeal against that part of the judgment which affirmed the order No. 40,367 of the Railway Board of February 16, 1928, so far as relating to the Bloor Street subways should be dismissed, and the appeal against that part of the judgment which set aside the order No. 40,367 of the Railway Board of February 16, 1928, so far as relating to the Royce Avenue subway should be sustained and the order of the Railway Board to that extent restored. As regards costs, the Order in Council of February 27, 1930 (1.) granting special leave to the Canadian Pacific Railway Company and the Canadian National Railways to appeal against that part of the judgment of the Supreme Court of Canada which related to the Royce Avenue subway, and (2.) granting special leave to the Toronto Transportation Commission to appeal against that part of the judgment which related to the Bloor Street subways, directed that the appeals should be consolidated and heard together upon one Printed Case on each side. Nevertheless the Corporation of Toronto, which was cited as a respondent by the railway companies in the Royce Avenue appeal and by the Transportation Commission in the Bloor Street appeal

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lodged a separate case in which it supported the railway companies in both matters. The position of the Corporation was no doubt peculiar as regards the Royce Avenue appeal, for being a respondent it could not join in the appellant railway companies' case and disagreeing with the other respondent, the Transportation Commission, it could not join in the latter's case.

The Transportation Commission having been unsuccessful, both as appellants and as respondents, their Lordships are of opinion that in the consolidated appeals the Commission should be found liable in costs to the railway companies, but in one set of costs only, and that no costs should be found due to or by the Corporation of Toronto, while as regards the costs in the Supreme Court, where there was no order for costs owing to the divided success of the parties, the railway companies and the Corporation must have their costs against the Transportation Commission.

III.—MAIN STREET BRIDGE.

A third problem is presented for their Lordships' consideration in this separate appeal relating to the distribution of the cost of a work known as the Main Street Bridge, which was heard along with the Bloor Street and Royce Avenue consolidated appeals.

Prior to 1884 a public highway known as Dawes Road, then situated in the Township of York, crossed on the level the lines of the Grand Trunk Railway, now the Canadian National Railways. By an agreement of that year between the township and the railway company the portion of Dawes Road crossed by the railway was closed and a new substituted highway, now called Main Street, was carried over the railway by a bridge, which the railway company covenanted to build and keep in repair at its own expense. The district in which the bridge was situated subsequently became urban in character and was annexed to the City of Toronto. In 1919 the Corporation of the City applied to the Railway Board for an order on the railway company to reconstruct the bridge, and on July 3, 1920, the Railway Board, by order No. 29,923, ordered the railway company to do so at their own cost, according to specified dimensions, at the same time ordering plans to be submitted for approval. A plan was accordingly prepared and lodged by the railway company and approved by the Railway Board on August 18, 1921. This plan was subsequently withdrawn and a substituted plan was approved by the Railway Board on October 20, 1921.

The statement of facts in the case contains the following passage: " Before approving the said plans the secretary of the Board instructed the Canadian National Railways that the chief engineer of the Board, before passing on the said plans, required the same to be submitted to the City of Toronto, and also suggested that the same had better be submitted to the Ontario Railway and Municipal Board in view of the probability of the Toronto street railway using the said bridge to cross over in the future and further stated that upon these approvals being obtained he was prepared to pass upon the said plans. The bridge shown upon such plans was designed of sufficient strength to meet all possible stresses of highway travel including street cars and the detailed drawings showed street car tracks in situ."

The former bridge is stated to have been physically solid and capable of carrying without the danger of a breakdown the traffic offered, but because of its dimensions to have been inadequate to accommodate the volume of the traffic.

The new bridge was completed and opened for traffic on December 1, 1921.

On September 1, 1921, the Toronto Transportation Commission, which had been constituted on August 3, 1920, assumed, as above explained, the management of the street railway system in Toronto. In June, 1922, the Commission decided to construct a line over the new bridge and began to lay its tracks upon Main Street. While this work, which was completed on July 15, 1922, was in progress the railway company, on June 19, 1922, addressed a letter to the Railway Board complaining that the Transportation Commission had no authority for carrying its track over the new bridge and

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contesting the contention of the Commission that the approval by the Railway Board of a plan showing street railway tracks on the bridge was equivalent to the approval required under s. 252 of the Railway Act for the laying of the street railway track across the bridge. That section prohibits the crossing of the railway lines or tracks of any railway company by the railway lines or tracks of any other railway company without the leave of the Railway Board. The railway company accordingly applied for an order declaring that the approval of the plans for the bridge showing street railway tracks thereon was not the granting of leave by the Railway Board under s. 252 for the crossing of their line by the tracks of the Transportation Commission or alternatively for an order cancelling or amending the approval of the plans and further for an order that the Transportation Commission might be permitted to lay its tracks over the bridge only upon condition of paying to the railway company such proportion of the cost of construction and maintenance of the bridge as the Railway Board should direct.

On June 26, 1922, the railway company applied formally for a review of the allocation of cost of the new bridge, the application being made under ss. 51 and 39 of the Railway Act, quoted above. The grounds of the application were (inter alia): "(*a*) That since the judgment and order were made herein different circumstances have arisen in connection with a proposal to operate electric street railway cars across the bridge" and "(*b*) That in any event the discretion which the Board exercised under s. 39 of the Act in imposing the whole cost on the Grand Trunk Railway Company was not under the circumstances rightly exercised."

On September 21, 1922, the Transportation Commission applied to the Railway Board for an order under s. 252 of the Railway Act permitting it to cross the line of the railway company by the new bridge until the final disposal of the railway company's application for review of the allocation of its cost. This application was made by leave of the Railway Board without prejudice to the Commission's rights or to the submission that the permission of the Railway Board was not

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required for the crossing. Temporary permission was on October 10, 1922, granted by the Railway Board to the Commission to cross with its street railway the line of the railway company by means of the new overhead bridge pending the disposal of the railway company's application for review. The Transportation Commission has accordingly, since October 19, 1922, operated a service of street cars over the bridge.

On March 4, 1926, the Railway Board granted the railway company's application for a rehearing of its former order No. 29,923 of July 3, 1920, imposing the cost of the reconstruction of the bridge on the railway company alone. The chief ground for granting the rehearing was apparently that in pronouncing their former order the Railway Board had been under a misconception as to the facts relating to the construction of the original bridge and had consequently held the case to be governed by an inapplicable precedent, although the changed situation brought about by the advent of the street railway traffic was also mentioned. With the grounds on which the rehearing was granted their Lordships are, however, not concerned. At the rehearing the whole question of the allocation of the cost of the reconstruction of the bridge was reconsidered, with the result that the Railway Board issued an order, No. 40,120, dated January 3, 1928, amending its former order of July 3, 1920, and imposing the cost of the work of reconstruction as to 60 per cent. on the railway company, as to 30 per cent. on the City of Toronto, and as to 10 per cent. on the Transportation Commission.

The Transportation Commission thereupon applied to the Railway Board for leave to appeal against this order No. 40,120 on the ground that as matter of law the Board had no jurisdiction to order a contribution from the Commission towards the cost of reconstructing the bridge. Leave to appeal upon this question was granted by the Railway Board on November 21, 1928. On March 2, 1929, Mignault J. of the Supreme Court of Canada, on the application of the Transportation Commission, granted leave to appeal on the further question whether, if the Railway Board had jurisdiction under the Railway Act to make the order complained of, the Parliament of Canada had jurisdiction to confer by the Railway Act jurisdiction on the Railway Board to compel contribution from the Transportation Commission, a Provincial corporation, towards the cost of the work in question under the circumstances of the case.

The appeal of the Transportation Commission to the Supreme Court resulted in the affirmance of the order of the Railway Board, Mignault J. dissenting. The judgment of the majority was delivered by Anglin C.J., with whom Newcombe, Lamont, and Smith JJ. concurred. The learned Chief Justice said: "Whether the Order against which this appeal is taken be viewed as an exercise by the Board of the powers conferred by ss. 257 and 259" [quoted supra] "upon an application to cross under s. 252 made by the appellants or whether it should be viewed merely as a case in which the Board is 'reviewing . . . . and altering or varying' (s. 51) an order or decision already made by it in regard to the payment of the cost of the bridge in question, its jurisdiction to make the order now in appeal seems to us to be indubitable. The appellant Transportation Commission was, in our opinion, clearly a company 'interested or affected by' the order for the construction of the new bridge within the meaning of s. 39, sub-s. 1" [quoted supra]. "That section applies to such an order (*Toronto Ry. Co.* v. *Toronto City* (1)) and therefore it was within the jurisdiction of the Board under sub-s. 2 thereof to determine by whom, and in what proportions, the cost and expense of the construction thereby directed should be borne. That the appellant is not a company 'interested or affected by' order No. 29,923 is scarcely arguable. If the present circumstances had existed in 1920 the Board might have made order No. 40,120 when making order No. 29,923. Sects. 37 and 51 enabled it to make order No. 40,120 in 1928."

As regards the second question the Chief Justice said: "Of the constitutional validity of the railway legislation under discussion there is, in our opinion, not the slightest doubt:

(1) [1920] A. C. 426, 435 to 436, 437 to 438.

Toronto Ry. Co. v. *Toronto City.* (1)" Sect. 37, which has not hitherto been quoted, provides that "any power or authority vested in the Board may, though not so expressed, be exercised from time to time or at any time as the occasion may require."

Mignault J. agreed that the Railway Board was entitled under s. 51 to alter its previous decision "if it had jurisdiction otherwise to make the order complained of," but he held that under the circumstances the Railway Board had no jurisdiction to order the Transportation Commission to contribute to the cost of the reconstruction of the bridge. Relying on the cases of *British Columbia Electric Ry. Co.* v. *Vancouver, Victoria and Eastern Ry. Co.* (2) and *Toronto Ry. Co.* v. *Toronto City* (3), he took the view that neither the fact that the Transportation Commission derived benefit from the reconstruction of the bridge, nor the fact that it had applied without prejudice under s. 252 for leave to carry its tracks across the bridge, gave the Railway Board jurisdiction to order it to contribute to the cost of the work. He did not consider that the railway was constructed across the highway or that the work was for "the protection, safety and convenience of the public" within the meaning of s. 257, which he held to be inapplicable to the case as being merely one of a street improvement.

The Transportation Commission has now appealed to His Majesty in Council from the decision of the Supreme Court, and the appeal is resisted jointly by the Canadian National Railways and the Corporation of the City of Toronto.

Their Lordships entertain no doubt that the Railway Board under the wide powers conferred upon it by ss. 37 and 51 was entitled to review and alter its original order imposing on the railway company the whole cost of the reconstruction of the bridge. But any alteration to be made by it on its original order on such review must of course be such as it had jurisdiction to make. Now it is clear that s. 39 is applicable to the work of reconstruction which the

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(1) [1920] A. C. 426, 438.

(2) [1914] A. C. 1067.

(3) [1920] A. C. 426.

Board ordered on July 3, 1920. The critical question accordingly in this case, as in the Bloor Street and Royce Avenue subway cases, is whether the Transportation Commission was "interested or affected by" the order for the reconstruction of the bridge. The majority of the judges of the Supreme Court thought that the contrary was scarcely arguable. Mignault J. does not deal with the point but bases his opinion on the other grounds indicated.

Their Lordships have found the question to be attended with some difficulty. The Transportation Commission did not come into existence until August 3, 1920. How then could it be "interested or affected by" an order made on July 3, 1920? No order for contribution could have been pronounced against it on July 3, 1920, for it was then non-existent. True, after it came into existence it took advantage of the reconstructed bridge by carrying its track across it in 1922, but it could not have been a party to the original proceedings.

The answer, in their Lordships' opinion, is to be found in the view already expressed that the Railway Board when allocating the cost of a work which it has ordered is entitled to have regard to the situation as existing at the date when it considers the question of allocation. If new interests which are affected by the work have arisen since it was originally ordered their Lordships see no reason to doubt that the Railway Board can competently order contribution to the cost to be made from such quarters. The test of liability to contribute is not necessarily to be found in the answer to the question whether an order to execute the work could originally have been pronounced against the party sought to be made liable to contribute. When it was said in *Toronto Ry. Co.* v. *Toronto City* (1) that an order for contribution under s. 59, sub-s. 2, could "be made only on a company, municipality or person interested in or affected by the order directing the works," their Lordships did not mean that only a person who could originally have been ordered to construct the works could be made liable in contribution to their cost, but rather that no one could be ordered to contribute unless he could be shown to be interested in or affected by the works directed to be executed.

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(1) [1920] A. C. 426, 436.

Now when the Railway Board reconsidered, as it was entitled to do, its original order allocating the cost of the work in question, the Transportation Commission had its tracks laid across the reconstructed bridge and was operating a service of street cars over it. If that had been the position of affairs when the original order was pronounced the Transportation Commission in their Lordships' view would indubitably have been a party "interested or affected by" the work of reconstruction and could have been ordered to contribute to the cost. Equally, when the Railway Board reconsidered its original order, it was entitled to take into account the state of matters then existing and to order contribution accordingly.

Their Lordships thus find themselves in agreement with the decision of the Supreme Court and will humbly advise His Majesty that the appeal be dismissed. As regards costs in this case the Corporation of Toronto lodged a separate case adopting the case of the railway company. There does not appear to be any good reason why the corporation should not have joined with the railway company in their case. The Transportation Commission accordingly must be found liable to the railway company in their costs of the appeal; as regards the Toronto Corporation there should be no order as to costs.

Solicitors for Canadian Pacific Railway Company and Canadian National Railways: *Blake & Redden.*

Solicitors for Toronto Transportation Commission: *Lawrence Jones & Co.*

Solicitors for Toronto Corporation: *Freshfields, Leese & Munns.*

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GILMOUR AND ANOTHER . . . . . . APPELLANTS;

AND

MACPHILLAMY AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Construction—" Survivors "—Natural or stirpital meaning.

The word " survivors " in a will should be given its natural and ordinary meaning unless the context necessitates or justifies a departure therefrom; it is not enough for that purpose that the natural and ordinary meaning produces what might appear to be a capricious result, or one not in accordance with a logical scheme of disposition.

A testator directed that the income of the residue of his estate should be paid to his nine children in equal shares for their respective lives, provided that if any of his children should die without leaving issue, or widow or widower, the share of the child so dying should be equally divided among the survivors upon the same trusts and conditions; and that after the death of any child his or her share in the residue should be held (subject to a provision for widows and widowers) for his or her children equally:—

Held, that upon the death of a child of the testator unmarried the issue of a child who had died earlier were not entitled to participate.

Auger v. *Beaudry* [1920] A. C. 1010 followed.

Judgment of the Supreme Court of New South Wales affirmed.

APPEAL (No. 124 of 1929) from an order of the Supreme Court of New South Wales, in equity, dated December 20, 1928, upon an originating summons.

The summons related to the will of Charles MacPhillamy, who died on March 15, 1906. The question for determination upon the appeal was whether upon the true construction of the will the word " survivors " should be construed in its literal sense or in a stirpital sense.

The terms of the will and the relevant facts appear from the judgment of the Judicial Committee.

The Chief Judge in equity held that the word " survivors " should receive its natural meaning, and that accordingly the children of children who died before Harold A. MacPhillamy and Edith MacPhillamy respectively were not entitled to participate.

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* *Present:* LORD BLANESBURGH, LORD TOMLIN, and LORD RUSSELL OF KILLOWEN.

1930. June 27. *Gavin Simonds K.C.* and *A. C. Nesbitt* for the appellants. The testator showed by his will an intention to produce equality between his children and their respective families, but a strict or literal, as opposed to a stirpital construction of the word "survivors," defeats that object, and involves a division which is capricious. The context of the will, and in particular the use of the word "any," the words "upon the same trusts and conditions," and the word "survivors" not "survivor or survivors," show that the testator used "survivors" in its stirpital sense. [Reference was made to *Powell* v. *Hellicar* (1); *Curle's Trustees* v. *Millar* (2); *Wake* v. *Varah* (3); *Waite* v. *Littlewood* (4); *Inderwick* v. *Tatchell* (5); also to *Auger* v. *Beaudry*. (6)]

W. A. Greene K.C. and *Wilfrid Barton* for the respondents. The Board is invited to construe the word "survivors" in a manner which Lord Macnaghten in *King* v. *Frost* (7) described as "forced and fanciful." The modern authorities show that a forced construction of the word should not be given in order to give effect to what might appear to have been the general intention of the testator; also that little help is derived from the consideration that a possible intestacy would be avoided. *Curle's Trustees* v. *Millar* (2) is distinguishable, as the testator, by providing a gift over upon a general default showed a wish that there should not be an intestacy as to any part of the property. The present case is similar to *Auger* v. *Beaudry* (6), and, as in that case, the word should receive its natural meaning. [Reference was made also to *Beckwith* v. *Beckwith* (8) and *In re Benn*. (9)]

Gavin Simonds K.C. replied.

(1) [1919] 1 Ch. 138.
(2) 1920, S. C. (H. L.) 607.
(3) (1876) 2 Ch. D. 348.
(4) (1872) L. R. 8 Ch. 70.
(5) [1903] A. C. 120.
(6) [1920] A. C. 1010.
(7) (1890) 15 App. Cas. 548, 553.
(8) (1876) 46 L. J. (Ch.) 97.
(9) (1885) 29 Ch. D. 839.

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July 15. The judgment of their Lordships was delivered by

LORD TOMLIN. This is an appeal from an order dated December 20, 1928, of the Supreme Court of New South Wales in its equitable jurisdiction.

The order was made by Harvey J. upon an originating summons issued by the trustees of the will and codicil of Charles MacPhillamy deceased.

The only question upon this appeal is whether upon the true construction of the will the word "survivors," having regard to the context and circumstances, is to be construed literally, or is to be read as referring to survivorship by stirps. The Supreme Court has decided in the former sense, and the appellants who are grandchildren of the testator and are interested in contending for a stirpital construction of the word, have by an order dated September 2, 1929, duly obtained leave to appeal to His Majesty in Council.

The testator died on March 15, 1906, having made a will dated September 12, 1899, and one codicil which is not material to the question under appeal.

The testator left nine children surviving him. Five of his children died prior to November 14, 1924, one a son without having had issue and without leaving any widow, and four daughters leaving children who are still living and of whom some have issue living.

On November 14, 1924, Harold Arkell MacPhillamy, a son of the testator, died a bachelor, and on July 18, 1927, Edith MacPhillamy, who was the only daughter of the testator then living, died a spinster. She was survived by two brothers, the last survivors of the testator's nine children. They are both still living. One of such brothers is a bachelor. The other is married, and has issue children and grandchildren.

The question under appeal is as to the destination of the shares original and accruing of Harold Arkell MacPhillamy and Edith MacPhillamy.

The result of the order of the Supreme Court is to carry these shares to her two surviving brothers and their issue to the exclusion of the issue of any brother or sister who predeceased her.

The relevant passage in the testator's will relates to the disposition of his residue, and is in the following terms: "And as to all the rest and residue of my real and personal estate whatsoever and wheresoever the same shall be upon trust for my said trustees after payment of my just debts funeral and testamentary expenses to pay the rents income and profits thereof to the whole of my children Charles Smith MacPhillamy Walter John MacPhillamy Norman Robert MacPhillamy Harold Arkell MacPhillamy Sophia Fox Elizabeth Adams Lucy Ashe Emily Pilcher Edith MacPhillamy and Evelyn MacPhillamy in equal shares for the terms of their respective natural lives and after the decease of my said children then their his or her shares or share in the said trust funds shall be as hereinafter mentioned. Provided however that if any of my said children shall die without leaving lawful issue or widow or widower living at the date of their his or her decease, the shares or share of the said child so dying shall be equally divided amongst the survivors upon the same trusts and conditions. But in the event of any of my sons so dying leaving a widow or widows or of my said daughters or daughter so dying leaving widowers or a widower then one third part of the income to which my said son or sons or daughter or daughters so dying was or were entitled shall be for such widow or widows or widower or widowers (as the case may be) for the term of her his or their natural life or respective natural lives or until she he or they shall marry. And upon such respective death or deaths or marriage or marriages the share to which the said widow or widower was entitled shall thereupon be payable as the balance of the income of such child or children of me so dying and the balance of the income shall be for the lawful issue (if any) of such child or children of mine so dying in equal shares as tenants in common per stirpes and not per capita I declare that the estates of all females entitled under this my Will shall be for their respective separate use and free and clear from the debts control interference or engagements of husbands I declare that after the death of any child of mine his or her share in my said trust estate shall (subject to the hereinbefore provision for widows and widowers) be upon trust for his or her children in equal shares in manner following namely: the share of any grandchild of me who is in existence at my death to be upon trust for him or her for life and after his or her death for such grandchild's children in equal shares to vest at their attaining the age of twenty-one years and the share of any grandchild of me who may come into existence after my death to be upon trust for him or her absolutely to vest at his or her attaining the age of twenty-one years."

Their Lordships have been invited by the appellants whose parents predeceased Harold Arkell MacPhillamy and Edith MacPhillamy to place upon the word "survivors" an artificial meaning, which will enable them to participate in the distribution of those shares.

In order to justify a departure from the natural and ordinary meaning of any word or phrase there must be found in the instrument containing it a context which necessitates or justifies such departure. It is not enough that the natural and ordinary meaning may produce results which to some minds appear capricious or fail to accord with a logical scheme of disposition.

In their Lordships' view there is nothing in the context of the present will rendering it necessary or even possible to give to the word "survivors" any but its natural and ordinary meaning. On the contrary their Lordships think that the phrase "shall be equally divided amongst the survivors upon the same trusts and conditions" can only be read as meaning "shall be equally divided amongst the survivors so that each survivor takes a life interest with remainder to his children as in the case of his or her original share." In their Lordships' judgment this construction concludes the matter, because it necessarily involves the idea of successive trusts and of the survivor being some one intended to take an interest and therefore living. This will is in line with the will considered by their Lordships' Board in *Auger* v. *Beaudry* (1), and their Lordships agree with the judgment of the Chief Judge in Equity.

(1) [1920] A. C. 1010.

The appeal therefore fails, and their Lordships will humbly advise His Majesty accordingly.

The costs as between solicitor and client of all parties appearing before their Lordships will be provided for out of the capital of the disputed original and accruing shares of Harold Arkell MacPhillamy and Edith MacPhillamy.

Solicitors for appellants: *Light & Fulton.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

J. C.*
1930
July 25.

LOVIBOND, ON BEHALF OF HIMSELF AND OTHERS . . . . PETITIONER;

AND

GOVERNOR GENERAL OF CANADA AND ANOTHER . . . . RESPONDENTS.

Canada—Petition of Right—Governor General—Refusal of Fiat—Judicial Committee—Special Leave to appeal—"Judicial officer"—Petition of Right Act (*R. S. Can.* 1927, *c.* 158), *s.* 4—*Judicial Committee Act* (3 *&* 4 *Will.* 4, *c.* 41), *s.* 3.

The Governor General of Canada, in deciding under s. 4 of the Petition of Right Act of Canada whether to grant his fiat, does not act as a "judicial officer" within the meaning of s. 3 of the Judicial Committee Act, 1833, and consequently an appeal from his refusal does not lie to His Majesty in Council.

PETITION for special leave to appeal from the refusal of the Governor General of Canada to grant his fiat to a petition of right.

The present petition stated that the petitioner and numerous persons whom he represented were registered holders of preference shares and common shares in the Grand Trunk Railway Company of Canada, and that they had been deprived of their said shares without compensation and, it was submitted, illegally and under cover of statutes which were

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* *Present:* VISCOUNT DUNEDIN, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

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invalid and ultra vires the Dominion Legislature. It had been sought to bring the matter before the Exchequer Court of Canada by a petition of right, which was set out in the present petition. The said petition of right had been left with the Secretary of State for Canada in accordance with s. 4 of the Petition of Right Act (R. S. Can., 1927, c. 158) on January 17, 1929, but on July 10, 1929, he had intimated that a fiat had been refused, although, as was alleged, the Ministers of the Crown in Canada had encouraged the petitioner and those whom he represented to raise the matter by a petition of right. The petitioner prayed for special leave to appeal to His Majesty in Council from the said refusal.

By the Judicial Committee Act, 1833, s. 3: "All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or any law, statute, or custom may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule or order of any Court, judge, or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council. . . . ."

By the Petition of Right Act (R. S. Can., 1927, c. 158), s. 4: "A petition of right shall be left with the Secretary of State of Canada, for submission to the Governor General, so that he may consider it and, if he thinks fit, grant his fiat that right be done. . . . ."

1930. July 25. *W. A. Greene K.C.* (with him *Hon. Geoffrey Lawrence K.C.* and *Wilfrid Barton*) for the petitioner. In England the fiat to a petition of right is that of the Sovereign, though acting on the advice of the Attorney-General, consequently no appeal lies from a refusal. In Canada, however, the fiat is that of the Governor General, who is an officer of the Sovereign. A fiat to a petition of right should not be capriciously refused, and though not a matter of right it is granted unless the claim is of a frivolous nature: *Ryves* v. *Duke of Wellington* (1); *In re Nathan* (2); *Dyson* v.

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(1) (1846) 9 Beav. 579, 600.

(2) (1884) 12 Q. B. D. 461.

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Canada.

Attorney-General. (1) So too as to other fiats under the control of the Attorney-General: *Ex parte Newton.* (2) The petition in the present case was clearly not of a frivolous nature, and the discretion to grant or refuse a fiat was exercised upon a wrong principle. There is a right of appeal to the Privy Council by special leave, as the refusal was the determination of a judicial officer within the meaning of s. 3 of the Judicial Committee Act, 1833. The language of that section is very wide, and includes matters which are not in the ordinary sense judgments of a Court. That is shown by *In re John Wells.* (3) The effect of the Judicial Committee Act, 1833, is to refer to the Judicial Committee all such matters of complaint in His Majesty's dominions as before that Act could have been the subject of a petition to the King or the King in Council, and that includes the present matter. Though in constitutional theory there would be no objection to an Order in Council directing the Governor General to grant a fiat, that course might be contrary to the conventions of the constitution. The Board however could tender to His Majesty advice that a fiat ought to have been granted, and no doubt the authorities in Canada would act upon that advice.

The respondents did not appear.

The judgment of the Judicial Committee was delivered by

Viscount Dunedin. In their Lordships' opinion the Governor General in deciding whether to grant a fiat under s. 4 of the Petition of Right Act of Canada, does not act as a "judicial officer" within the meaning of s. 3 of the Judicial Committee Act, 1833. Consequently their Lordships cannot advise His Majesty to grant special leave to appeal.

Solicitors for petitioner: *Gard, Lyell & Co.*

(1) [1911] 1 K. B. 410, 421.
(2) (1855) 4 E. & B. 869.
(3) (1840) 3 Moo. P. C. 216.

Applied. Re SECHIARI (*decd.*). [1950] 1 All E.R. 417.

Referred to. Re HARRISON'S WILL TRUSTS. [1949] Ch. 678

Referred to. In re DUFF'S SETTLEMENT [1951] 1 Ch. 721

[PRIVY COUNCIL.]

J. C.*
1930
July 29.

R. A. HILL AND OTHERS . . . . . APPELLANTS;

AND

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES, LIMITED, AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Trust—Tenant for Life and Remainderman—Company—Dividend—Sale of Capital Assets—Alteration of Article of Association—Trustee's Failure to oppose Alteration—Alleged Breach of Duty.

A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other distribution of money, whether called dividend or bonus or any other name, can only be made by way of dividing profits. Moneys so paid to a shareholder who is a trustee consequently will belong prima facie to the person beneficially entitled to the income of the trust estate. If the moneys or any part of them are to be treated as corpus there must be some provision of the trust deed which brings about that result; no statement by the company or its officers can affect the rights of the beneficiaries in the matter.

In 1925 a pastoral company in New South Wales sold substantially the whole of its lands, live stock and other assets, and ceased to carry on its business. In 1926 a dividend was declared and paid as "a distribution of capital assets in advance of the winding up." No question arose in the appeal as to that dividend. In November, 1927, the company declared and paid a dividend, stating that it was paid out of the sale of the breeding stock. Upon an originating summons issued by trustees, who held over two-thirds of the shares issued, the Supreme Court held that the dividend should be treated as capital of the trust estate. Upon appeal to the Privy Council the respondents, while supporting that decision, contended alternatively that the dividend could not have been paid but for a breach of duty by the trustees in not opposing resolutions passed in 1926 altering one of the company's articles of association.

Held, that the dividend should be treated as income of the trust estate, but that the moneys should be retained by the trustees for a limited period, in order that the beneficiaries might, if they wished, assert in hostile litigation a claim based upon the alternative contention above stated, the materials necessary to dispose of that point not being fully before the Board.

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* *Present:* LORD BLANESBURGH, LORD TOMLIN, and LORD RUSSELL OF KILLOWEN.

Knowles v. *Ballarat Trustees, Executors and Agency Co.* (1916) 22 C. L. R. 212 and *Fisher* v. *Fisher* (1917) 23 C. L. R. 337 disapproved.

In re Bates [1928] Ch. 682 approved.

Bouch v. *Sproule* (1887) 12 App. Cas. 385 distinguished.

Judgment of the Supreme Court of New South Wales reversed.

APPEAL (No. 77 of 1929) from an order of the Supreme Court of New South Wales, in equity, dated November 12, 1928, upon an originating summons.

The respondent company as trustees of the will and codicils of Richard Hill, who died in 1895, held 40,800 shares in a company called the Buttabone Pastoral Co., Ld., and as trustees under a declaration of trust dated January 9, 1914, they held 17,600 shares in the same company. In November, 1927, the last named company paid to the respondent company, by way of dividend in respect of their two holdings of shares, the sums 19,380*l.* and 8360*l.* respectively.

The respondent company issued an originating summons in the Supreme Court of New South Wales, in equity, to determine as to each of the said sums whether they, as trustees, should treat it as capital or income under the respective trusts.

The facts are stated in the judgment of the Judicial Committee.

The originating summons was heard by Long Innes J., who pronounced that each of the two sums in question should be treated as capital. The learned judge held that he was bound by the decision of the High Court of Australia in *Knowles* v. *Ballarat Trustees, Executors and Agency Co.* (1), followed by that Court in *Fisher* v. *Fisher* (2); he recognized that the above decisions conflicted with the decision of Eve J. in *In re Bates.* (3)

1930. June 23, 26. *W. A. Greene K.C.* and *Wilfrid Barton* for the appellants. The decision appealed from is not only directly in conflict with that of Eve J. in *In re Bates* (3), but conflicts also with principles laid down by the House of Lords in *Bouch* v. *Sproule.* (1) It was held by Eve J., it is submitted rightly, that in the case of shares held in trust a conversion of profits into share capital is necessary to convert them into capital as between tenant for life and remainderman. *Bouch* v. *Sproule* (1) laid down the principle that a company cannot both distribute profits in the form of money and capitalize them. There is no English authority that a remainderman is entitled to any interest in profits lawfully distributed by a company not in liquidation. Any distribution of money, except on a reduction of capital, by which assets are released to the shareholders, can only be a distribution of profits, by whatever method it is made. The source from which the distributed profit is derived does not alter its character as between remainderman and life tenant, though it may be material for purposes of income tax. Nor is it material that the company when it makes the distribution contemplates winding up. [Reference was made to *In re Thomas* (2); *In re Speir* (3); *In re Taylor* (4); and, as to income tax, to *Commissioners of Inland Revenue* v. *Fisher's Executors* (5); and *Commissioners of Inland Revenue* v. *Wright.* (6)] The decisions of the majority of the High Court of Australia in *Knowles's* case (7) and *Fisher* v. *Fisher* (8) are inconsistent with *Bouch* v. *Sproule.* (1) The reasons given by Isaacs J. in dissenting were right. *In re Armitage* (9), which was relied on by the majority in the High Court, does not affect this case.

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(1) 22 C. L. R. 212.
(2) 23 C. L. R. 337.
(3) [1928] Ch. 682.

Gover K.C. and *A. C. Nesbitt* for the respondents other than the Permanent Trustee Company. There is no real difference between the appellants and these respondents as to the effect of *Bouch* v. *Sproule* (1), but the principle there laid down does not govern all cases between tenants for life and remaindermen. There may be cases where the material question is not simply whether the company has capitalized

(1) 12 App. Cas. 385.
(2) [1916] 2 Ch. 331.
(3) [1924] 1 Ch. 359.
(4) [1926] Ch. 923.
(5) [1926] A. C. 395.
(6) [1927] 1 K. B. 333.
(7) 22 C. L. R. 212.
(8) 23 C. L. R. 337.
(9) [1893] 3 Ch. 337.

its profits, but the broader question whether in the circumstances of the case as between tenants for life and remaindermen the money should be treated as capital or as income. *Irving* v. *Houstoun* (1) is an example. The cases relied on for the appellants were all cases in which the company was continuing to carry on its business. The present case is sui generis. It is peculiar in that the company had sold practically the whole of its assets in 1925; in 1926 it had announced to the shareholders that it was no longer carrying on its business and was distributing its capital assets in advance of winding up. Further, the testator cannot have contemplated that his business would be vested in a company, and that the company's directors could control whether part of the proceeds of the business should be income or capital. There is no reported case in which a tenant for life has been held entitled in circumstances such as these. The decision was right upon another ground. The dividend could not have been paid but for the alteration made in 1925 in article 122 of the articles of association. It was the duty of the trustees to oppose that alteration, or to take the direction of the Court before assenting. The alteration enabled what was not contemplated by the testator, and affected the basis of the compromise under which the company was formed. The fund is still in the hands of the trustees, and it is open to the Court to adjust the rights of the parties equitably. [Reference was made to *In re Evans* (2); *In re Hamilton* (3); and *In re Musgrave.* (4)]

W. A. Greene K.C. in reply. The bank cases, of which *Irving* v. *Houstoun* (1) is an example, were described by Lord Herschell in *Bouch* v. *Sproule* (5) as anomalous; they establish no principle applicable to this case. There was no evidence that the breeding stock was a capital asset; it may have been part of the natural increase of the sheep. The new point taken, if correct, involves placing a heavy burden on trustees. The dividend now in question could have been declared under the original article 122.

(1) (1803) 4 Paton, Sc. App. 521.
(2) [1913] 1 Ch. 23, 33.
(3) [1896] 2 Ch. 617.
(4) [1916] 2 Ch. 417.
(5) 12 App. Cas. 385, 397.

July 29. The judgment of their Lordships was delivered by

LORD RUSSELL OF KILLOWEN. The Permanent Trustee Company of New South Wales, Ld. (hereinafter referred to as the "trustee company"), is the trustee of the will of Richard Hill, deceased, and in that capacity holds as part of the investments, representing the trust estate, 40,800 shares in a company called the Buttabone Pastoral Co., Ld. (hereinafter called the "Buttabone Company"). The trustee company is also the trustee of the trust fund comprised in a trust declared by indenture dated January 9, 1914, and in that capacity holds 17,600 shares in the Buttabone Company.

In November, 1927, the trustee company received from the Buttabone Company a sum of 19,380*l.* in respect of the 40,800 shares, and a sum of 8360*l.* in respect of the 17,600 shares, and the questions raised for decision on the present appeal are whether the sum of 19,380*l.* is to be treated as corpus or income under the trusts of the said will, and whether the sum of 8360*l.* is to be treated as corpus or income under the trusts of the said indenture.

The relevant facts must first be stated. The testator (who died in August, 1895) was at his death the owner of a grazing property known as Buttabone Station; after his death additional lands were purchased, which were paid for partly out of income of his estate and partly by moneys borrowed on the security of the lands purchased. For some years the testator's lands and the lands so purchased were worked together as one business. It is not a matter of surprise that complications and litigation ensued. The litigation was compromised in 1909, with the Court's sanction, so as to bind infant beneficiaries. Under the compromise all the lands, both original and additional, were sold to the Buttabone Company, fully paid shares of 1*l.* each in that company to the number of 85,000 being received by the then trustees of the said will as representing the capital of the estate employed in the said business. Other fully paid shares were issued to those individuals whose income had been used for capital purposes in satisfaction of their claims and interest.

Subsequently, in 1914, the said declaration of trust was executed in exercise of powers contained in the said will for the purpose of settling upon certain trusts one of the shares of the testator's estate. Some of the said 85,000 shares were appropriated to those trusts.

Some of the settled shares held under the will have become distributable and have been distributed upon the deaths of tenants for life leaving issue, with the result that at the present time the trustee company holds the said 40,800 shares and the said 17,600 shares in the capacities before mentioned.

The Buttabone Company carried on business from the date of its incorporation, its business including wool-growing, the breeding and fattening of sheep and cattle, and the buying and selling of live stock.

In the year 1924 the board of directors determined that the time was opportune for disposing of the Buttabone Company's lands and stock to the best advantage of the shareholders, and between December 9, 1924, and April 22, 1925, substantially the whole of the Buttabone Company's lands, live stock and other assets were sold, but as to some of the lands the terms of sale allowed six years for the payment of the total purchase money. Save in so far as the proceeds of sale have been distributed as hereafter appears, those proceeds have been invested and the income of the investments, and the interest paid by purchasers during the six years, have been distributed as dividend among the shareholders.

No resolution has ever been passed for the winding up of the Buttabone Company, but on April 12, 1926, a resolution for voluntary liquidation proposed by a shareholder at a general meeting was defeated.

The original articles of association of the Buttabone Company relating to dividends were in the following form :—

"Article 122.—No dividend shall be payable except out of the profits arising from the business of the Company and no dividend shall carry interest. Article 124.—The directors may from time to time pay to the members (on account of the next forthcoming dividend) such interim dividends as in their judgment the position of the Company justifies. Subject as aforesaid the dividends shall be declared by the Company at its Ordinary General Meetings."

By special resolution passed at an extraordinary general meeting held on April 12, 1926, and confirmed at another extraordinary general meeting held on April 28, 1926, articles 122 and 124 were altered, and now run thus:—

"Article 122.—No dividend shall be payable except out of the profits of the Company, and no dividend shall carry interest. Article 124.—The directors may from time to time pay to the members such interim dividends as in their judgment the position of the Company justifies."

On April 28, 1926, the Board passed a resolution in the following terms: "Out of the sum of 103,342*l.* 14*s.* 3*d.*, which arose wholly and exclusively from the sale of the land and improvements of the Company which were not acquired for the purpose of re-sale at a profit, there be paid to the shareholders an interim dividend at the rate of 11*s.* 8¾*d.* per share, and that such dividend be payable at the Company's office on and after noon on May 6, 1926."

A circular letter, dated May 3, 1926, was sent to the shareholders, the terms of which ran thus: "I have been instructed by the directors to advise that at a meeting held on the 28th ultimo the Board decided to pay to the shareholders out of moneys arising wholly and exclusively from the sale of the Company's land and improvements, a dividend at the rate of 11*s.* 8¾*d.* per share, which is payable at the registered office of the Company at noon or after on Thursday the 6th instant. And I have further to advise that the directors decided to pay this dividend for the purpose of making a distribution of capital assets in advance of the winding up of the Company, as the Company has ceased to carry on its business. The directors have consulted a leading equity counsel who advises that this dividend is not subject to either State or Federal income tax."

No question arises for decision on this appeal in regard to this payment of 11*s.* 8¾*d.* per share.

On November 11, 1927, the Board passed a resolution in the following terms: "That out of the profits of the Company a cash dividend of 9*s*. 6*d*. in respect of each fully paid share in the Company be declared and to be payable as soon as funds are available."

A circular letter dated November 28, 1927, was sent to the shareholders, the terms of which run thus: "I have been instructed by the directors to advise that at a meeting held on the 11th instant it was decided to pay out of the profits of the Company a cash dividend of 9*s*. 6*d*. in respect of each fully paid share in the Company. In accordance with this decision I enclose cheque for   , being the amount to which you are entitled, and I will be obliged if you will sign and return to me in due course the attached form of acknowledgment. I have also been instructed to state that the dividend is being paid out of the profits arising from the sale of breeding stock, being assets of the Company not required for purposes of resale at a profit, and that it is free of income tax."

The trustee company having received the cash dividend of 9*s*. 6*d*. per share (amounting to 19,380*l*. in respect of the settled shares and 8360*l*. in respect of the shares subject to the declaration of trust) issued an originating summons for the determination of the questions: (1.) Whether upon the true construction of the said will and in the events which had happened the said sum of 19,380*l*. should be treated as income or capital of the settled shares, and (2.) whether upon the true construction of the said declaration of trust and in the events which had happened the said sum of 8360*l*. should be treated as income or corpus of the funds the subject of the said declaration of trust.

No distinction was drawn in the argument before their Lordships between these two sums, or between the phraseology of the trusts declared by the two instruments. The case was discussed by reference only to the wording of the will, and was argued upon the footing that according as the said sum of 19,380*l*. was to be treated as corpus or income under the will so the said sum of 8360*l*. was to be treated as corpus or income under the declaration of trust. The two sums stand or fall together, and may be considered as if they were both subject to the trusts of the will.

It is accordingly only necessary to refer, and that briefly, to the terms of the will. The first gift of income to the testator's sons and daughters is under the description of the balance or residue of "the net income to be derived from my said estate." This gift would appear to be confined to the period during which his daughter, Laura, resides in a certain cottage. There then follows a trust for sale and conversion of the whole estate and a trust of the proceeds in the following terms: "Upon trust to invest the same upon such security and generally in such manner as my trustees shall think fit with power to alter and vary any such investment or investments for another or others and to pay the net income or profits to be derived from such investment or investments in equal shares between my said ten sons and daughter during their respective lives, but so that each of them shall have the personal enjoyment thereof and not have the power to mortgage encumber or deprive himself or herself thereof by way of anticipation the share of my said daughter to be for her sole and separate use and free from the debts control or engagements of any husband and from and immediately after the death of each of my said sons and daughter upon trust as to one-eleventh part or share of the capital of my said trust estate for the child if only one or the children if more than one of the son or daughter so dying in equal shares and proportions as tenants in common and I declare that in the event of the death of any or either of my said sons or daughters without leaving lawful issue him or her surviving then and in such case the share of such son or daughter so dying shall be held upon trust in equal shares for the survivor or survivors of my said sons and daughter in the same manner as the original share devised to him her or them by this my will."

The case was also argued upon the footing that the payment of 9*s.* 6*d.* per share was the payment of a dividend by the directors in due and proper exercise of the powers conferred

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upon them by article 124. Further, it is common ground, and rightly so, that the shares of the Buttabone Company rank as authorized investments of the trust funds, both under the will and the declaration of trust.

These being the relevant facts of the case the point for decision is capable of statement thus: Is the sum of 19,380*l.* "net income or profits to be derived from such investment or investments," or is it "capital of my said trust estate"?

The question which thus arises is one which may frequently occur when investments, representing a settled trust fund, include shares in a limited company which are not restricted to a fixed rate of dividend. So long as such a company is a going concern and is not restricted as to the profits out of which it may pay dividends, it may distribute as dividends to its shareholders the excess of its revenue receipts over expenses properly chargeable to revenue account. The balance to the credit of profit and loss account may in many cases be divided as dividend even if the company's capital account is in debit; and such a distribution by way of dividend would, prima facie, be "income or profits" of the trust share, and belong to the tenant for life; it would not be "capital of my trust estate." On the other hand, if the company instead of distributing the same balance as dividends, resolved upon liquidation, the shareholder would be repaid his share capital and in addition the share of surplus assets in the liquidation attributable to his shares. The moneys received by the shareholder in the liquidation may be swollen by reason of the fact that the company has in its possession undivided profits, but no part thereof would belong to a tenant for life as income; it would all be corpus of the trust estate.

From this it would appear that moneys paid in respect of shares in a limited company may be income or corpus of a settled share according to the procedure adopted, i.e., according as the moneys are paid by way of dividend before liquidation or are paid by way of surplus assets in a winding up. Each process might appear to involve some injustice, the former to the remainderman, the latter to the tenant for life.

In truth the only method by which the rights of the respective cestuis que trust can be safeguarded and made incapable of being varied or affected by the conduct of the company, is by the insertion of special provisions in the trust instrument clearly defining the respective rights of income and corpus in regard to moneys received by the trustee from limited companies, in respect of shares therein held by him as part of the trust estate.

The learned judge in the present case decided that the two sums in question should be treated as corpus and not as income. The grounds of his decision appear to have been that the answer to the question depended upon what was the intention of the company in making the distribution, and that upon the whole of the evidence he came to the conclusion that the distribution was in fact, and was intended by the company to be, a distribution of capital assets in anticipation of liquidation. He further held that in order to convert profits into corpus as between tenant for life and remainderman, no conversion by the company of the profits into share capital was necessary, but that profits distributed might be corpus as between tenant for life and remainderman, even though no part of the fund was retained by the company in a capitalized form. As regards this part of his decision he realized that such a view was in conflict with the judgment of Eve J. in *In re Bates* (1), but he felt himself bound to consider the law as settled otherwise by reason of two decisions of the High Court of Australia—namely, *Knowles* v. *Ballarat Trustees, Executors and Agency Co.* (2) and *Fisher* v. *Fisher.* (3)

It will be necessary for their Lordships to consider these three authorities, and to decide which of them, in their view, is based on a correct interpretation of the law.

Before doing so it would seem advisable to draw attention to certain salient points relevant to the matter in debate.

(1.) A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder.

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(1) [1928] Ch. 682.

(2) 22 C. L. R. 212.

(3) 23 C. L. R. 337.

The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A. absolutely or as trustee for A. for life only.

(2.) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus," or any other name, it still must remain a payment on division of profits.

(3.) Moneys so paid to a shareholder will (if he be a trustee) prima facie belong to the person beneficially entitled to the income of the trust estate. If such moneys or any part thereof are to be treated as part of the corpus of the trust estate there must be some provision in the trust deed which brings about that result. No statement by the company or its officers that moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect upon the rights of the beneficiaries under a trust instrument which comprises shares in the company.

(4.) Other considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits, so deals with it that no part of it leaves the possession of the company, but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders, who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend.

(5.) The result of such a dealing is obviously wholly different from the result of paying away the profits to the shareholders. In the latter case the amount of cash distributed disappears on both sides of the company's balance sheet. It is lost to the company. The fund of undistributed profits which has been divided ceases to figure among the company's liabilities; the cash necessary to provide the dividend is raised and paid away, the company's assets being reduced by that amount. In the former case the assets of the company remain undiminished, but on the liabilities' side of the balance sheet (although the total remains unchanged) the item representing undivided profits disappears, its place being taken by a corresponding increase of liability in respect of issued share capital. In other words, moneys which had been capable of division by the company as profits among its shareholders have ceased for all time to be so divisible, and can never be paid to the shareholders except upon a reduction of capital or in a winding up. The fully paid shares representing them and received by the trustees are therefore received by them as corpus and not as income.

Their Lordships now turn to the decisions which bound the learned judge and formed the basis of his judgment. Inasmuch as much consideration was given by the High Court of Australia and before their Lordships' Board to the decision of the House of Lords in *Bouch* v. *Sproule* (1), it is advisable to consider what was the decision in that case and what was the basis upon which it rested. It is not, in their Lordships' view, an authority for the proposition that the company's statement of intention determines as between tenant for life and remainderman whether a sum paid away by the company to a shareholder who is a trustee is income or corpus of his trust estate. In *Bouch* v. *Sproule* (1) no moneys, in fact, left the company's possession at all. It is not an authority which touches a case in which a company parts with moneys to its shareholders. The essence of the case was that the company, not by its statements, but by its acts, showed that what the shareholders got from the company was not a share of profits divided by the company, but an interest in moneys which had been converted from divisible profits into moneys capitalized and rendered for ever incapable of being divided as profits. In those circumstances it was held that shares which were issued to a trustee shareholder, and which

(1) 12 App. Cas. 385.

represented the moneys so capitalized, were as between his cestuis que trust corpus and not income, because the company had decided that the profits in question should be permanently added to the company's capital. Lord Watson stated the point concisely when he said (1): "In a case like the present, where the company has power to determine whether profits reserved, and temporarily devoted to capital purposes, shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company."

There is no decision in the Courts of this country which justifies the view that a person beneficially entitled in remainder to shares in a limited company, is entitled to any interest in profits lawfully distributed during the lifetime of the tenant for life by a company not in liquidation, and such a view is, their Lordships think, contrary to principle. The nearest approach to such a decision is to be found in the cases which are referred to in *Bouch* v. *Sproule* (2), and are commonly known as the bank cases, of which one, *Irving* v. *Houstoun* (3), is a decision of the House of Lords. They, however, are cases sui generis, not susceptible of easy explanation. As Lord Herschell said in *Bouch* v. *Sproule* (4), *Irving* v. *Houstoun* (3) is "an authority governing only a case similar in its facts; that is to say, a case where the company has no power to increase its capital, but has accumulated profits, and used them, in fact, for capital purposes, and afterwards distributes these profits among the proprietors."

In the case of *Knowles* v. *Ballarat Trustees, Executors and Agency Co.* (5), the facts were that the directors of a limited company which was not in liquidation by resolution resolved upon the payment to the members of (1.) a dividend of 6*d.* per share; (2.) a bonus of 6*d.* per share; and (3.) "distribution of assets 10*s.* per share." The holders of some shares in the company (who held them under a will upon trust for a tenant for life) having received these sums, applied to the

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(1) 12 App. Cas. 385, 401.

(2) 12 App. Cas. 385.

(3) 4 Paton, Sc. App. 521.

(4) 12 App. Cas. 385, 397.

(5) 22 C. L. R. 212.

Court to have it determined whether the 10*s.* per share was income or capital. The will contained no special provisions relevant to the question. The 10*s.* per share was paid out of accumulated profits. The High Court (Isaacs J. dissenting) held that the moneys were capital of the trust estate, because though they were payments of cash made out of accumulated profits the company intended the moneys to be a distribution of capital as distinguished from dividends.

A careful consideration of the judgments delivered by the majority of the High Court judges satisfies their Lordships that the decision is based upon the view that a company, when dividing among its shareholders a sum of accumulated profit, is entitled to dictate and determine whether the moneys so received by the shareholder shall, in his hands, be deemed corpus or income. Their Lordships know of no earlier authority justifying this view. It is a matter with which the company has not the remotest concern. If payment to the shareholders is made out of profits it is income of the shares, and no statement of the company or its directors can change it from income into corpus. Their Lordships agree with, and are content to refer to, the dissenting judgment of Isaacs J. as a correct exposition of the law.

Before parting with the *Knowles* case (1) their Lordships desire to say a word in reference to *In re Armitage* (2), upon which reliance was placed by Griffiths C.J. and Barton J. The legal position in that case was quite plain. The old company had sold its assets (including accumulated profits) to the new company for a price which produced surplus assets in the winding up of the old company to the amount of 9*l.* 5*s.* 6*d.* for each share of the old company upon which only 8*l.* per share had, in fact, been paid up. Upon no theory could it be said that any part of the 9*l.* 5*s.* 6*d.* was payable to the tenant for life. The moneys paid were all surplus assets distributed in a winding up and took the place in the trust estate of the shares themselves. The difference between the 9*l.* 5*s.* 6*d.* and the 8*l.* was a profit to the trust estate, just as if the shares had been sold and had realized 9*l.* 5*s.* 6*d.*

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(1) 22 C. L. R. 212.

(2) [1893] 3 Ch. 337.

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per share; but no part of the 9*l*. 5*s*. 6*d*. was income of the tenant for life.

The other decision of the High Court, *Fisher* v. *Fisher* (1), requires no additional discussion. The majority of the judges followed their previous decisions in the *Knowles* case. (2) Isaacs J. again dissented.

These were the two authorities which in the present case Long Innes J. felt constrained to follow, in preference to adopting the reasoning of Eve J. in the later case of *In re Bates*. (3)

There the directors of a limited company had made payments to shareholders out of distributable profit, but had stated: "It must be clearly understood that this is neither a dividend nor a bonus, but is a capital distribution." Eve J. held that the payments were income receivable by a tenant for life. This appears to their Lordships to be an authority directly applicable to the present case, and their Lordships find themselves in complete agreement with the learned judge, both as regards his decision and the reasoning upon which it is based. Their Lordships desire to adopt the language used by Eve J., and to say in regard to the fund out of which the sums of 19,380*l*. and 8360*l*. were paid by the Buttabone Company to the trustee company: "Unless and until the fund was in fact capitalised it retained its characteristics of a distributable property . . . . no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital. It remained an uncapitalised surplus available for distribution, either as dividend or bonus on the shares, or as a special division of an ascertained profit . . . . and in the hands of those who received it it retained the same characteristics."

For these reasons their Lordships are of opinion that the two sums here in question should be treated as income and not as corpus. They are "net income or profits derived from such investment or investments"; they are not "capital of my said trust estate."

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(1) 23 C. L. R. 337.

(2) 22 C. L. R. 212.

(3) [1928] Ch. 682.

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Their Lordships desire to add that they see no reason for assuming that in making this distribution the directors had in mind any question of rights as between tenants for life and remaindermen beneficially interested in shares held by trustee shareholders. It may be that they had, but the wording of the circular letter of November 28, 1927, appears to their Lordships to indicate that the principal questions present to the minds of the directors were: (1.) the relief of their shareholders from liability to pay income tax on the profits distributed, and (2.) s. 4 (*g*) of the Income Tax Assessment Act, 1924.

Counsel for the respondents addressed to their Lordships a new and alternative argument. It was this. It was said that the distribution of 9*s*. 6*d*. per share out of profits arising from the sale of breeding stock could not have been made if the old article 122 of the company's had remained unaltered; that no alteration could have been made if the trustee company had voted against it; that in not voting against the alteration the trustee company has committed a breach of duty; that a breach of duty by a trustee cannot operate to alter the beneficial rights and interests of his cestuis que trust; and that as a matter of administration the Court would direct the trustee company to deal with the moneys so as to prevent the remaindermen from being prejudiced by being deprived of a fund of which they could not have been deprived if the articles of association had not been altered.

This would appear an unusual contention to be raised and determined upon an originating summons issued by a trustee; but it must fail in these proceedings, because the basic allegation has not been proved—namely, that the distribution could not have been made under the old article 122. This is a question upon which (depending as it does upon the consideration of materials not before them) their Lordships express no conclusion.

Their Lordships are accordingly of opinion, upon the materials before them, that the two sums mentioned in the originating summons should be treated as income, and that the decree of November 12, 1928, should be varied by

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substituting the word "income" for the word "capital" in the first declaration therein contained and by substituting the word "income" for the word "corpus" in the second declaration therein contained, and they will humbly advise His Majesty accordingly.

Their Lordships, however, feel that an opportunity should be given to any beneficiaries who may desire so to do, to assert in hostile litigation (and at their own risk as to costs and otherwise) a claim to have all or any part of the funds retained as capital upon the ground (as indicated above) that the dividend in question could not have been paid if article 122 of the company's articles of association had not been altered.

Their Lordships accordingly think that a direction should be given to the trustee company not to pay over the moneys to the tenants for life before October 31, 1930. If in the meantime any action is commenced as above mentioned the trustees can apply in that action for directions as to how they should deal with the said moneys pending the decision thereof.

The costs of all parties of this appeal will be taxed as between solicitor and client and paid rateably out of the two sums in question in these proceedings.

Solicitors for appellants: *Montagu's and Cox & Cardale.*
Solicitors for respondents: *Light & Fulton.*

END OF VOL. AND OF APPELLATE SERIES FOR 1930.

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